162 U.S. 570

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 813.

COUNT JOSEPH TELFENER, PLAINTIFF IN ERROR,

vs.

GEORGE W. RUSS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 6, 1894.
CERTIORARI AND RETURN FILED NOVEMBER 2, 1894.

(15,697.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from circuit court of United States for western district of Texas	3	1
Caption	3	1
Transcript from State court	3	1
Petition	3	1
Exhibit M—Agreement between Russ and Telfener, November 1, 1882	11	9
Exhibit N—Agreement between Telfener and Russ, November 1, 1882	13	11
Petition for removal	14	12
Bond for removal	15	12
Order for removal	16	13
Bill of costs	16	14
Clerk's certificate	17	14
Amended answer	17	15
Charge of the court	19	16
Plaintiff's requests to charge	25	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1894.

	Original	Print.
Defendant's requests to charge	25	22
Judgment	28	25
Bill of exceptions	30	27
Exception No. 1	30	27
Exception No. 2	31	28
Exception No. 3	32	29
Exception No. 4	35	32
Petition for writ of error	38	35
Assignment of errors	39	35
Bond on writ of error	42	38
Writ of error	43	39
Citation	44	40
Clerk's certificate	44	40
Hearing and submission	46	41
Judgment	47	42
Petition for rehearing	48	42
Order refusing rehearing	53	45
Opinion	54	46
Clerk's certificate	63	50
Writ of certiorari	64	50
Return to writ of certiorari	66	50
Stipulation that transcript filed with petition for certiorari be taken as return to certiorari	67	51

1 & 2 UNITED STATES OF AMERICA, }
Fifth Judicial District. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of November, A. D. 1893, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable Harry G. Toulmin, United States district judge for the southern district of Alabama.

COUNT JOSEPH TELFENER, Plaintiff in Error, }
v.
GEORGE W. RUSS, Defendant in Error. }

Be it remembered that heretofore, to wit, on the 28th of August, 1893, a transcript of the record of the above-styled cause from the United States circuit court for the western district of Texas was filed in the office of the clerk of said United States circuit court of appeals in the words and figures following, to wit:

3 *Caption.*

Be it remembered. At a regular term of the United States circuit court begun and holden at Austin, within and for the western district of Texas, before the Honorable T. S. Maxey, and ending on the 18th day of July, A. D. 1893, the following case came on for trial and proceedings had therein, as follows, to wit:

GEORGE W. RUSS, Plaintiff, }
versus } No. 1918.
COUNT J. TELFENER, Defendant. }

Plaintiff's Original Petition and Exhibits M and N.

STATE OF TEXAS, }
County of Travis, Texas, } *ss:*

In Travis District Court, October Term, 1883.

GEORGE W. RUSS }
vs. } Action for Breach of Contract.
COUNT J. TELFENER. }

To the district court of the county of Travis and State of Texas:

George W. Russ, plaintiff, complaining of Joseph Telfener, defendant, represents, that plaintiff is a resident of the city of Dallas, county of Dallas, and State of Texas; that defendant is usually and better known as and represents himself to be Count J. Telfener, by which name he is hereby sued, and that defendant is not a resident or citizen of the State of Texas, but is a transient person and is now

temporarily at, to wit, the city of New York, in the State of New York.

That on the 1st day of November, 1882, plaintiff was the sole owner of a certain valuable, valid, and transferable interest in the whole of a certain body of land, containing, as subsequently ascertained by lawful survey, eighteen hundred and thirteen tracts of land of six hundred and forty acres each, being in the aggregate one million one hundred and sixty thousand three hundred and twenty acres, situated in the county of El Paso and State of Texas, and forming a part of what is known as the "Pacific reservation;" that plaintiff had become the owner of said interest in said eighteen hundred and thirteen tracts by complying with the require-
4 ments of the laws of the State of Texas, and particularly by complying with the requirements of the act of the legislature of the State of Texas entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, as amended by the appropriate act approved March 11, 1881, entitled "An act to amend sections one and six" of the above-entitled act of July 14, 1879.

That plaintiff during the month of October, 1882, being a responsible party and intending to purchase said body of land, which was lawfully subject to purchase and sale under the terms of said acts of July 14, 1879, and March 11, 1881, applied to the surveyor of the county of El Paso, State of Texas, in writing, for the purchase from the State of Texas and for the survey of said eighteen hundred and thirteen sections or tracts, describing the same by metes and bounds as a whole; that pursuant to the instructions of the Hon. W. C. Walsh, the commissioner of the general land office of the State of Texas, to the surveyors of the counties and land districts containing the lands subject to sale under said acts, plaintiff made his application for purchase and survey of said lands to the surveyor of said county of El Paso, in writing, describing said lands by metes and bounds, courses and distances, which application was by said surveyor duly filed and recorded in the office of said surveyor during the month of October, 1882; that said application consisted of two different written instruments, each describing different portions of said lands.

That plaintiff having thus made due application for the purchase and survey of said lands, was, on the 1st day of November, 1882, about to proceed to have said lands surveyed into tracts of six hundred and forty acres each, when defendant, by his duly authorized agents, applied to plaintiff to purchase of plaintiff his interest in said lands, acquired as hereinbefore stated; that plaintiff having not yet paid to the State of Texas the fifty cents per acre to which said State was entitled, and defendant offering to assume such payment to the State, and desiring simply to contract with plaintiff for the purchase and assignment of plaintiff's right to purchase from the State, they—*i. e.*, the plaintiff in person and the defendant by his agent—at the city of Dallas, Texas, on the 1st day of November, A. D. 1882, executed a written contract, evidenced by two separate

instruments, each of which is made a part of this petition by a copy attached hereto and marked Exhibits M and N; that by the terms of said contract, as evidenced by that instrument herein referred to as Exhibit M, it is recited that the plaintiff "claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue" of the act hereinbefore described. Said instrument further recited that said application had been made in October, 1882, and duly filed in the surveyor's office of El Paso county, Ysleta.

5 And plaintiff avers that the tract of land thus described as "about one million acres of land, more or less," was intended to describe the eighteen hundred and thirteen sections hereinbefore mentioned, and that the application mentioned in said instrument as made and filed in October, 1882, is the same application hereinbefore alleged as having been made and filed by the plaintiff.

That said instrument further recites that the defendant was desirous of "purchasing from said Russ," the plaintiff, "all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law," the said act of July 14, 1879, as amended, "entitle said Russ," the plaintiff, "to become the purchaser of said lands from the State of Texas;" that said instrument thereupon recited that in case (such) said application had been duly made and filed, which plaintiff again avers had been done, the defendant has "agreed and promised to pay to the said Russ," the plaintiff, "as consideration of his sale, transfer, and assignment of all his said rights, titles, and interests twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ," the plaintiff, "has agreed and bound himself, in consideration of said price and sum to be paid him, to sell, transfer, and assign unto the said Count Telfener," the defendant, "all his rights, titles, and interests in said lands acquired by his said application and files."

And plaintiff avers, that by the terms of this contract thus set out above literally, the plaintiff sold and agreed to assign to said defendant, and the defendant purchased and agreed to accept from the plaintiff, at and for the price of twenty-five cents per acre, a conveyance of plaintiff's said application for purchase from the State of Texas of said eighteen hundred and thirteen sections of land in El Paso county, Texas, forming part of said Pacific reservation.

And plaintiff further avers, that he was at the date of said contract able and duly authorized to make such contract of sale, and to execute and deliver to the defendant a proper and valid assignment and transfer of his said application and of all plaintiff's rights, titles, and interests thereunder.

The said contract, as evidenced by the instrument herein by copy designated as "Exhibit M," proceeded to recite, that "in order that said contract of purchase and sale and assignment may be effected, the said parties," the plaintiff and defendant, "agree as follows:

The said Count Telfener," the defendant, "for the purpose of ascertaining whether the said application has been regularly and properly made as aforesaid, and according to the provisions of said law, and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files
6 of the surveyor's office of El Paso county, at Ysleta, and the maps of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as, under the terms of said law, would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties," the plaintiff and defendant, "shall ascertain by reference to said application and files and the maps of said county in said surveyor's office and in the office of the commissioner of the general land office of the State at Austin, the number of acres approximately embraced in or covered by said application and files, the number of acres being ascertained by approximation in manner aforesaid; and said application having been found good and regular as aforesaid, the said Count Telfener," the defendant, "agrees to pay to said Russ in cash, in the city of Dallas or the city of Austin, Texas, as the said Russ," the plaintiff, "shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ," the plaintiff, "agrees and binds himself that, upon such payment being made, he shall execute and deliver to said Count Telfener," the defendant, "any and all deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count J. Telfener," the defendant, "all and singular the rights, titles, and interests that the said Russ," the plaintiff, "now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same or any part thereof by, through, or under him," the plaintiff. "It is understood, however, that the said inspection, ascertainment of regularity of files, and the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Telfener," the defendant, "shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid."

And plaintiff alleges, that pursuant to and in performance of said terms of contract herein before immediately recited, the plaintiff in person and the defendant by his duly authorized agents, repaired to Ysleta, El Paso county, Texas, on the 3d day of November, 1882, and then and there inspected the records and files of the surveyor's office of El Paso county county, Texas, and the maps of said county in said surveyor's office, and the application of plaintiff for purchase and survey of said Pacific reservation lands; and that as a result of said inspection defendant found, and plaintiff avers, that the said application and files had been regularly and properly made in such manner as under the terms of said laws of the State of Texas would entitle the plaintiff to become the purchaser of said lands from the State of Texas; and plaintiff further avers that upon said inspec-

tion at Ysleta, by reference to plaintiff's said application and
7 files and the maps of said El Paso county on file in said surveyor's office, and also on the 6th day of November, 1882, by an inspection of the maps of said El Paso county on file in the office of the commissioner of the general land office of the State of Texas, at Austin, Texas, by approximation that the number of acres embraced under said contract as covered by said application which the plaintiff as such applicant and defendant as plaintiff's assignee under said contract would be entitled to purchase from the State of Texas under the laws thereof, would be one million one hundred and sixty thousand three hundred and twenty acres; and plaintiff avers that the full purchase price of said land at said contract price of twenty-five cents per acre was two hundred and ninety thousand and eighty ($290,080) dollars, of which sum there became due and payable to the plaintiff from the defendant on the 15th day of November, 1882, under the terms of said contract, ninety per centum thereof, being two hundred and sixty-one thousand and seventy-two ($261,072) dollars.

And plaintiff further avers, that on and prior to the 15th day of November, 1882, the defendant, having full knowledge of said inspection and approximation, and knowing himself to be indebted to plaintiff in said sum, and having in his possession the duplicate of said contract (which had been executed in duplicate), was notified by plaintiff that he, the plaintiff, would be present at the city of Dallas, Texas, on the 15th day of November, A. D. 1882, for the purpose of receiving from the defendant said ninety per centum of said purchase price and for the execution to the defendant of any and all deeds or other instruments proper or necessary to convey, transfer, and assign to the defendant all and singular the rights, titles, and interests that the plaintiff had or was entitled to in and to said lands by reason of such application and files, and to bind himself by such conveyance, by covenant of warranty, against all persons claiming or to claim said land or any part thereof by, through, or under the plaintiff; and plaintiff further avers, that on said 15th day of November, 1882, he, plaintiff, was present at his office, in the said city of Dallas, Texas, during the whole of said day, for the purpose of receiving from the defendant said payment of ninety per centum and for the purpose of executing to said defendant a conveyance in every respect conforming to the requirements of said contract, as herein before recited, but that the defendant, without any explanation of his absence and without any denial of his liability under said contract, and without in any manner asking delay or postponement, and without any request for modification, amendment, or recession (rescission) of said contract, and without notifying the plaintiff as to defendant's whereabouts, wholly failed to appear in the city of Dallas, Texas, and utterly and entirely failed, and has to this time utterly and entirely failed, to pay
8 to this plaintiff any part of said purchase price, and that defendant has never since the execution of said contract, either in person or by agent or attorney, offered to make said payment to

the plaintiff or to accept from the plaintiff said conveyance of said lands.

And plaintiff further avers, that at no time since the execution of said contract up to this present time has there been any valid adverse claim to said lands which would have been a cloud upon or the basis of a controversy concerning plaintiff's title to said lands under said application; and plaintiff further avers, that ever since and on the 15th day of November, 1882, up to and at this moment, he, plaintiff, has been and is willing, upon receipt of said purchase price as provided in said contract, to execute to said defendant the conveyance contemplated and agreed upon by said contract, and of this fact the defendant and his agents have been repeatedly notified since and on said 15th day of November, 1882; and plaintiff further avers, that since the 15th day of November, 1882, prior to bringing this suit, the plaintiff repeatedly notified defendant that he, plaintiff, relying upon said contract, would endeavor to sell said lands to other parties for the benefit of both plaintiff and defendant, holding the latter liable for any loss that plaintiff might incur by reason of a sale for a less sum than that specified in plaintiff's said contract with defendant; and plaintiff further avers, that he, at great expense and outlay of time and money, endeavored constantly from and after November 15, 1882, to sell his right to said lands to other parties for the benefit of said plaintiff and defendant, but that he wholly failed to make any sale thereof whatever; that from and after said date he used his best efforts to dispose of his right, title, and interest in said lands at the best price obtainable, but was unable to dispose of same at any price whatever; that his said right was at any time from any after said date unsaleable at any price.

Plaintiff further alleges, that under the terms of said contract, as shown by "Exhibit M," it was therein recited and agreed that "after the transfer and assignment as aforesaid" (set out theretofore in said contract) "shall have been made by the said Russ," the plaintiff, "the said Count Telfener" the defendant, "shall proceed without delay and have said lands surveyed and platted, and the field-notes thereof returned and filed according to the provisions of said law. Upon the completion (of) said surveys and field-notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the sum so paid as aforesaid by said Count Telfener," the defendant, "shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid in cash at once to said Russ," the plaintiff, "by the said Count Telfener;" the defendant, "in the city of Dallas, Texas, or in Austin, Texas, as the said Russ may prefer."

9 Plaintiff further alleges, that pursuant to the clause of said contract last above set out herein, providing for the survey of said lands, plaintiff and defendant, in the same manner as and at the same time that the instrument herein set out as "Exhibit M" was executed, executed that part of said contract herein set out by the copy marked "Exhibit N," which recited that "whereas the said parties," the plaintiff and defendant, had "entered into a con-

tract" (herein set out by said copy marked "Exhibit M") "providing for the sale and transfer by said Russ," the plaintiff, "to the said Count Telfener," the defendant, "of all the right, title, and interest of said Russ," the plaintiff, "in a certain tract of land of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ," the plaintiff, "has made application under and by virtue of the act of the legislature of Texas, approved July 14, 1879, known as 'the fifty-cent act;' and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land and file the field-notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the general land office at Austin within the time required by the said law. Now, therefore, it is agreed by the said Russ," the plaintiff, "that if the said sale and transfer shall be made under the said contract as aforesaid" ("Exhibit M") "he," the plaintiff, "will, at his own proper cost and expense, make all the surveys, field-notes, and maps of the said lands and file them in the office of the surveyor of El Paso county and in the general land office of the State, at Austin, in the manner and within the time required by the provisions of the said law of July 14, 1879, amended by the act of March 11, 1881, and that he," the plaintiff, "will pay all the fees required to be paid for such patents as shall be issued by the commissioner of the general land office for said lands to said Count Telfener," the defendant, "his heirs or assigns, the said surveys, field-notes, and maps to be correct; and in consideration of said services and payments to be rendered and paid by said Russ," the plaintiff, "the said Count Telfener," the defendant, "agrees and binds himself to pay to said Russ," the plaintiff, "in cash, at the city of Dallas or at Austin, Texas, the sum of five cents per acre for each and every acre so surveyed, platted, and returned by him," the plaintiff, "as aforesaid, said payment to be made as follows, viz., three cents per acre when the surveys and field-notes shall be completed, one cent per acre when the field-notes shall be filed in the land office, and the balance when the patent shall issue."

And plaintiff alleges that upon the execution of said instruments herein set out as "Exhibits M and N," constituting this contract for purchase and survey, he at once perfected arrangements for the surveying of said lands as agreed upon, and at the special instance and request of defendant, through his lawfully authorized agent, began such survey before the 15 day of November, 1882; that on defendant's failure to make payment of said ninety per centum of the purchase-price plaintiff notified defendant, through defendant's agents, that he, plaintiff, had already contracted with the county surveyor of El Paso county, Texas, for the survey of said lands, and that he, plaintiff, having already incurred a liability for the cost of such surveying, and having already expended large sums of money in making said survey, and that, therefore, he, the plaintiff, was willing at any time, at either the city of Austin or the city of Dallas, Texas, to receive said ninety per centum of the purchase-money and execute such conveyance to defendant, and that he, plaintiff, would continue said survey until it was completed,

holding himself ready and liable at any time that defendant would perform his part of said contract to make to the defendant the conveyance called for by said contract.

Plaintiff further alleges, that with the view of protecting the rights of both plaintiff and defendant under said contract and to prevent said lands from being forfeited to the State of Texas by his, plaintiff's, failure to have them surveyed within the time required by law, he, the plaintiff, caused said survey to be completed according to law, and on the 8th day of Januaay, 1883, he filed lawful and complete field-notes of such survey, duly certified and executed by the surveyor of El Paso county, Texas, accompanied by proper and complete maps in the office of the commissioner of the general land office of the State of Texas, at the city of Austin, Texas, where said field-notes and maps were duly and officially filed, and where they yet remain as part of the records of that office. Plaintiff further avers, that said survey, field-notes, and maps were and are correct. Plaintiff further avers, that said field-notes were made in his name, not merely in compliance with law, but also to protect himself until defendant should make the payments due plaintiff under said contract, but not with a view of asserting claim to said lands adverse to defendant's rights under said contract upon defendant's performance of his agreements therein.

Plaintiff further alleges, that defendant having in his possession continuously from and after the 1st day of November, 1882, the duplicate of said contract, and being fully advised of plaintiff's actions, demands, and willingness to perform said contract, never notified plaintiff that he, defendant, intended to refuse to accept the benefits of said contract, but on the contrary, held himself out to capitalists as being the owner of said lands under said contract. Plaintiff further avers, that he performed, on his part, each and every act by him stipulated to be done, except that he did not make said conveyance to defendant because of the latter's failure to perform any part of his agreements; that plaintiff has always been and
11 still is willing and hereby offers to execute to the defendant the conveyance mentioned in said contract and in all things to perform his part of said contract.

Plaintiff further avers, that in all things the defendant has failed to perform his part of said contract, especially in failing to pay to plaintiff said purchase price or any part thereof, in failing to pay to plaintiff the five cents per acre for surveying said lands and filing the field-notes and maps of said survey, amounting to fifty-eight thousand and sixteen dollars, and in failing to pay to the State of Texas, as required by law, the fifty cents per acre entitling the purchaser to patents—all to plaintiff's damage in the sum of four hundred thousand dollars.

To pay said several sums of money or either of them the said defendant has wholly made default, although often requested to pay the same, both at said town of Dallas and at said town of Austin; wherefore plaintiff brings this suit and prays that the said defendant be duly and legally cited as a party defendant hereto, and that upon the final hearing hereof that he, the plaintiff, may have judg-

ment for said sums of money of twenty-five cents per acre so due and owing him for said one million one hundred and sixty thousand three hundred and twenty acres, as also for said sum of fifty-eight thousand and sixteen dollars, so due him on said contract marked "Exhibit N" as aforesaid, together with legal rate of interest thereon since both of said sums of money became due and payable, and for such other and further order, judgment, and decree in the premises as on the hearing hereof may seem equitable and just, as well as all costs in this suit expended; and so petitioner will ever pray, etc.

HANCOCK & SHELLY,
Att'ys for Pl'ff.

Copy.

EXHIBIT M.

THE STATE OF TEXAS, }
County of Dallas, } *ss:*

This contract and agreement, entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows:

Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue of an act of the legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and duly filed in the
12 surveyor's office of El Paso county, at Ysleta; and whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, tities, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the State of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his said application and files. In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly and properly made as aforesaid and according to the provisions of said law, and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the

surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said surveyor's office and in the office of the commissioner of the general land office of the State at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation, in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, titles, and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same, or any part thereof, by, through, or under him. It is understood, however, that the said inspection, ascertainment of regu-
13 larity of files, and of the amount of land by approximation, shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

After the transfer and assignment as aforesaid shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted and the field-notes thereof returned and filed according to the provisions of said law.

Upon the completion of said surveys and field-notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

Witness our hands this 1st day of November, 1882.

GEO. W. RUSS.
J. TELFENER,
By C. BACCARISSE, *Ag't.*

Witness-:
CHAS. FRED. TUCKER.
WM. McGRAIN.

EXHIBIT N.

This contract and agreement, entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows:

Whereas, the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the legislature of Texas approved July 14, 1879, known as the 50-cent act; and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land and file the field-notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the general land office at Austin within the time required by the said law. Now, therefore, it is agreed by the said Russ that if the sale and transfer shall be made under the said contract as aforesaid he will, at his own proper cost and expense, make all the surveys, field-notes, and maps of the said lands and file them in the office of the surveyor of El Paso county and in the general land office of the State at
14 Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the commissioner of the general land office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field-notes, and maps to be correct, and in consideration of said services and payments to be rendered and paid by said Russ, the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz: Three (3) cents per acre when the survey and field-notes shall be completed, and one (1) cent per acre when the field-notes shall be filed in the land office, and the balance when the patents shall issue.

Witness our hands this 1st day of November, 1882.

(Signed) GEO. W. RUSS.
J. TELFENER,
By C. BACCARISSE, *Ag't.*

Endorsement: 6038. Geo. W. Russ *vs.* Count J. Telfener. Original petition. Filed June 16, 1883. Jas. P. Hart, clerk.

Petition, Bond, and Judgment for Removal.

In the District Court of Travis County, State of Texas.

GEORGE W. RUSS, Plaintiff,
vs.
Count J. TELFENER, Defendant. } No. 6038.

Petition for removal to the circuit court of the United States for the western district of Texas, at Austin.

To said district court:

Your petitioner respectfully shows to said honorable court that the matter and amount in dispute in above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars. That the controversy in said suit is between a citizen of the State of Texas, of the United States, and a citizen and subject of a foreign state, and that petitioner was at the time of the commencement of this suit and still is a citizen and subject of the Kingdom of Italy, and that said George W. Russ was at the time of the commencement of this suit and still is a citizen of the State of Texas; and your petitioner offers herewith a bond, with good and sufficient security, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the surety and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the said western district of Texas, at Austin; and he will ever pray, etc.

J. TELFENER,
By GLASS & CALLENDER AND
A. J. PEELER, *His Attorneys.*

(Endorsed:) 6038. Filed October 1, 1883. Jas. P. Hart, clerk.

STATE OF TEXAS, }
Travis County. }

Before the undersigned authority personally came C. K. Westcott, who, being duly sworn, deposes and says that he is and has been for two years last past personally acquainted with Count J. Telfener, the petitioner named in above petition, and that said Telfener was and is, as he is represented to be in said petition, a citizen and subject of a foreign State, to wit, of the Kingdom of Italy.

C. K. WESTCOTT.

Sworn to and subscribed before me this 24th day of September, A. D. 1883.

In testimony I hereto set my hand and seal of office.

[L. S.] R. C. SHELLEY,
Notary Public, Travis County, Texas.

(Endorsed:) 6038. Filed October 1, 1883. Jas. P. Hart, clerk.

Know all men by these presents that we, J. Telfener, as principal, and —— ——, as sureties, are held and firmly bound unto George W. Russ in the penal sum of five hundred ($500.00) dollars, for the payment whereof, well and truly to be made unto the said George W. Russ, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said J. Telfener having petitioned the district court of Travis county, State of Texas, for the removal of a certain cause therein pending, wherein the said George W. Russ is plaintiff and the said J. Telfener is defendant, to the circuit court of the United States in and for the western district of the State of Texas, at Austin; now if the said J. Telfener, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do or cause to be done such other and appropriate acts as may be required of
16 him in the matter of the removal aforesaid, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this the 1st day of October, 1883.

J. TELFENER,
By GLASS & CALLENDER AND
A. J. PEELER, *His Attorneys.*
FRANK HAMILTON,
JOHN J. TOBIN, *Sureties.*

Approved:
JAS. P. HART,
Clerk Dist. Ct., Travis County, Texas.

Accepted & approved.
Oct. 15, 1883.

A. J. WALKER,
Judge 16th Dist., &c.

(Endorsed:) 6038. Filed Oct. 1st, 1883. Jas. P. Hart, clerk.

GEO. W. RUSS
vs.
Count J. TELFENER. } No. 6038.

And now, on this the 15th day of October, 1883, the defendant, by his attorney, having presented his petition and bond for the re-

moval of this cause to the United States circuit court, having submitted the same to the court, on the 5th day of October, 1883, and said petition and bond, appearing regular, are received and the bond approved:

It is now, therefore, ordered by the court that further proceedings in this cause be suspended.

Bill of Costs.

GEO. W. RUSS *vs.* COUNT J. TELFENER. } No. 6038.

Clerk's fees:					
Doc. suit		20	Clerk's costs for'd		$55 20
Issuing notice and dup.	1	50			
" citation and dup.		75	Sheriff's fees:		
En. copy pet. and cert.	26	85	Serv. cit. Fenner, sh'ff Victoria Co.	1	50
Entering appearance		15			
" order		75			$56 70
Taking 1 bond	1	50			
Filing 10 papers	1	50	Comm'r fee N. Y.	1	00
Ent. judg't of suspension,		75			$57 70
Tax cost		25			
Transcript	21	00	By error order		75
	$55	20			$56 95

17 THE STATE OF TEXAS, }
County of Travis. }

I, James P. Hart, clerk of the district court of Travis county, Texas, do hereby certify that the foregoing on — pages is a just, true, and correct copy of all the proceedings had and pleadings filed in the case No. 6038 of George W. Russ *vs.* Count J. Telfener, as appears from the record and on file in my office.

Witness my hand and the seal of said court, at office in Austin, this 16th day of October, A. D. 1883.

[SEAL.]

JAS. P. HART,
Clerk D. C. T. C., Texas,
By W. H. SHELLEY, *Dep'ty.*

(Endorsed:) No. 1918. Count J. Telfener *vs.* Geo. W. Russ. Transcript. Filed Oct. 26, 1883. M. Hopkins, cl'k, by Sam. Hopkins, dep'ty cl'k.

Defendant's Amended Answer.

In United States Circuit Court at Austin, Texas.

GEORGE W. RUSS
vs.
Count J. TELFENER.

And now comes the defendant, leave of court being first obtained, and files this his first amended original answer to plaintiff's original petition, and for answer says:

1. Said petition is insufficient in law to require him to answer thereto; wherefore, etc.

2. Defendant specially excepts to said petition as follows: To so much and to such portions and allegations of said petition as seek a recovery of damages for anything done by plaintiff or any expense incurred by plaintiff in carrying out or attempting to carry out by plaintiff any of the terms or provisions of the contracts in said petition mentiond after the 15th day of November, 1882.

3. Said defendant denies all and singular the allegations contained in plaintiff's petition; and of this he puts himself upon the country and prays judgment of the court.

4. Further answering, defendant says, that if said Bacarisse ever had any authority to negotiate in regard to the purchase of land in Texas it was merely as an employé under one C. K. Westcott, and said Bacarisse was merely employed to enquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands subject to the inspection and
18 approval of the lands by an expert or inspector sent out by a London syndicate to make such inspection and report, no such contract to be final and binding unless ratified by this defendant after such expert had reported his approval of the land, but neither Westcott nor any other person had authority to execute such contracts as are set up in plaintiff's petition. This defendant never knew till shortly before this suit was instituted that said Bacarisse had attempted to execute any such contracts as are set up in plaintiff's petition, and if he ever heard that any contract had been made with plaintiff for lands he supposed it was a contract subject to his own ratification after the report of said expert, and if he ever proposed to sell any of said lands to said syndicate or other capitalists it was done upon the supposition that he had a contract for the purchase subject to his ratification and which he expected to ratify if the expert aforesaid should report favorably upon the lands; but defendant says said expert reported unfavorably upon plaintiff's lands, and this defendant never ratified the alleged contracts made by Bacarisse.

5. And, further answering, the defendant saith on oath that the contracts mentioned in plaintiff's petition and made exhibits thereof were not executed by this defendant nor by his authority, and that C. Baccarisse, by whom as agent for this defendant said contracts

purport to have been executed, was not authorized by this defendant to execute said contracts, or either of them.

6. This defendant further says that the eighteen hundred and thirteen sections of land mentioned in plaintiff's petition, were never actually surveyed on the ground, but the field-notes to same were made by and in the office of A. M. Randolph, county surveyor of El Paso county, Texas, and were and are now void and under which plaintiff can claim no right whatever.

Joseph Telfener, defendant above named, being duly sworn, saith on oath that the statements of the foregoing answer purporting to be made on oath are true.

J. TELFENER.

Sworn to and subscribed by said Joseph Telfener before me, vice-consul general of the United States of America, at Paris, France, this fifteenth day of September, A. D. 1883. Witness my hand and seal of office.

[SEAL.] ROB'T M. HOOPER,
Vice-consul General, Paris.
GLASS & CALLENDER &
A. J. PEELER, *For Def't.*

Endorsed in the following words, to wit:

1918. Russ *vs.* Telfener. Defendant's 1st am. original ans. to pl'ff's orig. petition. Filed Febr'y 2nd, '86. Sam. Hopkins, clerk.

19 *Charge of the Court, Including Special Instructions Given.*

United States Circuit Court of the Western District of Texas, Austin Division.

GEORGE W. RUSS
vs. } 1918.
JOSEPH TELFENER.

GENTLEMEN OF THE JURY:

Plaintiff brings his suit to recover damages because of alleged breach of contract on part of defendant. In his pleadings the plaintiff sets up two contracts, which he claims were executed by the defendant. The first is known as Exhibit "M" and the second as Exhibit "N." Both were executed on the same day, to wit, the first day of November, 1882, and both were signed by the same parties. The plaintiff signs his own name in person, and the name of defendant is signed as follows: "J. Telfener, by C. Baccarisse, agent."

The defendant denies that he executed the contracts in person, and further denies that Baccarisse had authority to execute them in his behalf, and hence he claims that they are not binding upon him.

The first question, therefore, presented for your consideration is,

whether the contracts, particularly the one known as Exhibit "M," were executed in such manner as to be valid and binding upon the defendant.

No formal power of attorney executed by the defendant has been introduced in evidence expressly conferring authority upon Baccarisse to execute the contracts in question. You must, therefore, look to all the facts and circumstances in evidence, apart from the declarations of those professing to act as agents, to determine whether Baccarisse was duly authorized to execute the contracts declared upon. If, from consideration of the evidence, you conclude that Baccarisse had authority direct from the defendant to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from, and knowledge and consent of, defendant, empowered Baccarisse to execute it. But if Baccarisse was neither empowered directly by the defendant, nor by Westcott, with authority from and knowledge and consent of defendant, to execute the contract, then it would not be binding upon the defendant, unless he ratified the same as hereinafter stated. If Baccarisse had no authority from defendant or Westcott, as above stated, to execute the contract, then it would not be binding upon the defendant, unless he, having a full knowledge of the terms of the agreement and the material facts and circumstances attending its execution, acquiesced in and recognized the same as his contract, in which event he would be held to have ratified it and it would be binding upon him.

To make it binding upon him in such case, you observe, he must have ratified the contract with full knowledge of its terms and of the material facts and circumstances attending its execution. If he did so ratify it, then it would be binding upon him as though he had given authority to make the contract before the same was executed.

It is a familiar maxim that ratification has a retroactive efficacy and relates back to the inception of the transaction, and, when deliberately made with a knowledge of the circumstances, as before stated, cannot be revoked or recalled.

If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created, notwithstanding he might have given private instructions to Baccarisse not to purchase without referring the matter to him for his ratification, provided, that such instructions were not communicated to and known by the plaintiff. If, however, the plaintiff knew that Baccarisse was instructed not to close any trade without first referring the matter to the defendant, then the plaintiff could not enforce a contract so

made with Baccarisse without complying with such restrictions upon his authority.

To illustrate, and in the illustration I quote the language of my predecessor in charging the jury upon a former occasion:

"Suppose I send out agents to procure lands for me by purchase or otherwise. I give my agents certain specific directions to govern them, and then say to them, you must, before closing the trade, submit the trade to me for my approval; my agents go out and contract with persons and do close a trade, but without referring the same to me before closing. The agent having pursued the ordinary mode for procuring lands, and the person with whom he deals not being advised of the restrictions by me placed upon my agent, but deals with him in good faith, and upon that faith changes his relation to the property, I am bound, because the agent acted within the general scope of his authority," and because the third persons are not affected by private instructions given to the agent which are not made known to them.

"This is, of course, to be taken with the qualification that if the person dealing with the agent knew of the instruction which was a limitation upon his right to act, and made a contract in violation of that instruction, he cannot enforce it against me."

The defendant having denied under oath the execution of the contract by duly authorized agent, the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the contract was executed in such manner as to be binding upon the defendant.

21 If, upon a consideration of all the facts and circumstances in evidence, taken in connection with the foregoing charge, you reach the conclusion that the contract is not binding upon the defendant, then you will proceed no further except simply to return a verdict in his favor. If, however, your finding upon that issue be in favor of the plaintiff, you will then proceed to the consideration of other issues involved in the cause.

Plaintiff's applications for the purchase of the lands involved in this controversy were filed respectively on the 4th and 5th days of October, 1882. On the 1st day of November, following, as already stated, the contract designated "M" was executed.

This contract recites that plaintiff had, in due form, made application for the purchase of about one million acres of land, more or less, in El Paso county, in accordance with an act of the legislature of Texas, approved July 14, 1879; that defendant was desirous of purchasing from plaintiff all his rights, titles, and interest under and by reason of such application, provided it should appear that such application had been regularly made and filed in such manner as would, under the terms of said law, entitle plaintiff to become the purchaser of said lands from the State of Texas; and in such case, defendant agreed and promised to pay plaintiff, as consideration of his sale, transfer, and assignment, of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application and file, and plaintiff agreed and bound himself, in consideration of such price and sum to be paid to

him, to sell, transfer, and assign, unto the defendant all his rights, titles, and interest in said lands acquired by said application and file.

In short, it was provided that if, upon examination, it should be found that by going forward under the law the party could secure the land, then defendant was to pay said amount to plaintiff for the rights which he had acquired under his application to purchase, and plaintiff was to convey such right, title and interest to the defendant. At the date of the contract it was not definitely known just how many acres were embraced in the applications, and the contract provides for the payment of 90 per cent. of the estimated quantity, and this payment was to be made on or before the 15th day of November, 1882. It was further provided therein that, upon the completion of the surveys and field-notes, the number of acres embraced in said lands so sold and transferred by the plaintiff to the defendant should be ascertained, and if the said 90 per centum to be paid by the defendant should not amount to the full purchase price of twenty-five cents per acre, then the deficit should be paid at once in cash by the defendant to the plaintiff in the city of Dallas or Austin, as the plaintiff might prefer.

Under the contract known as Exhibit "N" the plaintiff,
22 for the considerations therein named, agreed to have the lands surveyed and field-notes returned, &c., as required by law.

In reference to this contract, known as Exhibit "N," the plaintiff cannot recover of defendant any damages because of a breach, or supposed breach, thereof, and you are instructed accordingly. You may, however, look to that contract, in connection with the evidence, to determine the exact number of surveys of land which are embraced in plaintiff's two applications. On this point, the evidence from the land office clearly shows that 1813 surveys of 640 acres each were made under plaintiff's two applications, and you are so instructed. Of the 1813 surveys, plaintiff claims nothing as to twenty-five thereof, which must be deducted, leaving involved in the controversy 1788 surveys of 640 acres each, or, 1,144,320 acres.

The legislature of this State passed the act before referred to, of the 14th of July, 1879, by which it put upon the market lands which had been reserved from location and sale by what was known as the Pacific reservation. This reservation embraced lands in El Paso county, which were covered by the plaintiff's applications and surveys. The sections of said act which bear upon the questions in hand, are the following:

"SEC. 2. That any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"SEC. 3 It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the

field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases.

"SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act all legal surveyor's fees for work done by them.

"SEC. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map and field-notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase-money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the State treasurer for such purchase-money, said commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for."

23 The two applications of plaintiff for the purchase of the land, filed in the surveyor's office of El Paso county, as before stated, are a sufficient compliance with the law of 1879 to constitute them valid applications. They were regularly made and filed in such manner as, under the terms of said law, would have entitled plaintiff to become the purchaser from the State of Texas of the lands embraced therein had other provisions of the law been complied with in reference to making surveys, returning field-notes, etc., paying patent and other fees and the fifty cents per acre required by the act.

The certificate of the commissioner of the general land office shows that on the 8th day of January, 1883, plaintiff filed in the land office the field-notes of 1813 surveys of 640 acres each, and it is further shown that a map of said surveys was duly filed in the general land office. The certificate of the commissioner further shows that the surveys made for plaintiff were made beginning on the 20th day of October, 1882, and ending on the 9th day of November, 1882. It further appears from said certificate that all of said surveys were made on and prior to November 1, except blocks "G," "H," "I," and "J," embracing in the aggregate ninety-eight sections, which were surveyed after November 1, but prior to the 15th day of November, 1882; hence it follows that all the lands were surveyed prior to the 15th day of November, the date provided in the contract for the payment of the 90 per cent. by defendant and the execution of transfers by plaintiff.

Gentlemen, you observe from reading the law, that the surveyor was required to make the surveys upon application by responsible parties. The question of the responsibility of the plaintiff, when he applied to have the surveys made, was one to be determined by the surveyor who surveyed the lands, and the presumption would be conclusive, in the absence of testimony to the contrary, that the plaintiff was such responsible person. You are further instructed, that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown

by the evidence, was a valuable right and one which could be lawfully assigned.

If, under the foregoing charge and the evidence in the case, you conclude that the contracts were executed in such manner as to be binding upon the defendant, then you will determine, from all the facts and circumstances in evidence, whether the plaintiff has in good faith performed all things required of him by said contract marked Exhibit "M," and whether he stood ready on the 15th day of November, 1882, to execute transfers to defendant of his right, title and interest in and to said 1788 surveys embraced in his two applications. You will further look to the evidence to determine whether the defendant has performed his part of said con-
24 tract, marked Exhibit "M," as by its terms prescribed, and has, in accordance therewith, paid to the plaintiff the amount of money which he thereby agreed to pay.

If, upon consideration of the testimony, you find that plaintiff has in good faith performed his part of said contract marked Exhibit "M," and that the defendant has failed to comply with his part thereof, by declining to pay plaintiff as provided therein, then it would be your duty to return a verdict in favor of the plaintiff for such amount of actual damages as you find from the testimony he has sustained by reason of the breach of said contract on the part of the defendant.

As before stated, there remain for your consideration only 1788 surveys of 640 acres each, containing in the aggregate 1,144,320 acres of land. The plaintiff claims that he is entitled to damages at the rate of twenty-five cents per acre on said 1,144,320 acres, as he contends that defendant agreed to pay him twenty-five cents per acre for his right, title, and interest to the lands embraced within his application.

Upon this point, it was said by the supreme court, when this case was recently before it, that: "On the 15th of November he ('the plaintiff') possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

Further on, the court uses this language: "The measure of damages must be the difference between the contract price and the salable value of the right when payment was made."

If anything could have been obtained from the sale of that right, if you hold that the contract was binding upon the defendant, it was the duty of the plaintiff to make the sale when the defendant defaulted in his contract, and thus to have subjected him to as little loss as practicable.

You will, therefore, look to all the evidence in the case to determine the salable value of the plaintiff's rights on the 15th of November, 1882. If you conclude, from the consideration of all the facts and circumstances in evidence, that at said date said right had no salable value—in other words, that it was completely and abso-

lutely worthless—then the measure of damages would be twenty-five cents per acre on the 1,144,320 acres. If, however, you find from the testimony that such right did have, on said 15th of November, 1882, a salable value, then you will determine what that salable value was, and the measure of damages would be the difference between the contract price and the salable value of the right at that date.

If you find a verdict in favor of the plaintiff for any amount of damages you will award him interest thereon at the rate of
25 eight per cent. per annum from said 15th day of November, 1882, to the present time. If, under the evidence and the foregoing charge, your finding be in favor of the plaintiff, you will return a verdict in the following form:

"We the jury find for the plaintiff, and assess his damages as follows:

"1. Principal amount, ——.

"2. Interest at the rate of 8 per cent. per annum from November 15, 1882, to the present time, ——.

"Total amount of damages, ——."

You, gentlemen, to fill up the blanks with the amount of damages and interest found and have the verdict signed by your foreman.

If, however, your verdict be in favor of the defendant, you will simply say:

"We, the jury, find for the defendant."

You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony, and you are authorized to predicate your finding upon a preponderance of the evidence.

The case, gentlemen of the jury, is now in your hands; you will take it and render such a verdict as may be just and right in view of the evidence and the instructions of the court.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 1918. Geo. W. Russ *v.* Joseph Telfener. Charge of the court. Filed July 11th, 1893. D. H. Hart, clerk.

GEO. W. *BUSS*
vs.
Count JOSEPH TELFENER.

Charge asked by plaintiff.

Plaintiff requests the court to give the following charge, in addition to the general charge given:

By salable value of plaintiff's right to the lands filed on by him it is meant the amount which by the use of reasonable efforts plaintiff could have sold said right for on the 15th day of November, 1882.

FISET & MILLER,
Att'ys for Plaintiff.

Given.

T. S. MAXEY, *Judge.*

Charge 1 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 1.

Defendant asks the court to charge the jury as follows:

Letters and telegrams between two persons both claiming to be agents of the same person, or between such agents and third
26 parties, are not evidence of the existence of the agency, or of the extent of the authority conferred, unless the principal had knowledge of and assented to such communications.

J. L. PEELER.
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

Charge 2 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 2.

Defendant asks the court to charge the jury as follows:

The jury are instructed that when the act of ratifying the act of the agent is claimed to be implied from a knowledge of the facts by the principal, it must appear by a preponderance of the evidence that the principal had full knowledge of all the facts affecting his interest in the transaction, and the jury are not to indulge presumptions against the defendant unless such presumptions are compatible with the facts in the case.

J. L. PEELER,
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

Charge 3 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 3.

The defendant asks the court to charge the jury as follows:

The jury are instructed as a matter of law, that upon the issue raised by defendant's plea of "*non est factum*," by which he denies under oath the authority of C. Baccarisse to execute for him the contracts of November first, 1882, the burden of proof is on the plaintiff to prove that authority, and he must prove his case as to this issue by a preponderance of evidence.

J. L. PEELER,
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

Charge 4 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 4.

Defendant asks the court to charge the jury as follows: If the jury find from the evidence that the defendant did not in
27 fact authorize Westcott or Baccarisse to make absolute contracts for the purchase of lands or files upon lands, but that their authority as conferred by the defendant, and as understood by them, was only an authority to file on State lands or to make with private parties conditional contracts subject to the defendant's approval and ratification upon the receipt of an expert's report as to the character or quality of the land, and if the jury further find that the defendant in his correspondence with his agents had used expressions which, if taken alone, might seem to imply that those agents had a general authority to purchase lands for the defendant, the jury cannot on the account of such expressions hold the defendant bound by the contract sued on unless the jury further find that letters or telegrams containing such expressions were shown to the plaintiff at or before the making of the contract sued on, and that he was thereby induced to believe that Baccarisse had authority to make said contract.

J. L. PEELER,
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

Charge 5 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 5.

Defendant asks the court to charge the jury as follows:
No words or acts of the defendant can be considered a ratification of the contract sued on or a recognition of it as binding upon him, unless such words or acts were said or done after the defendant had full knowledge of the nature and terms of the contract.

J. L. PEELER,
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

Charge 12 asked by defendant.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 12.

Defendant asks the court to charge the jury as follows:
The jury are instructed that the burden of proof is on the person

dealing with any one as an agent through whom he seeks to charge another as principal to show by a preponderance of evidence that the agency did exist, and that the agent had the authority he assumes to exercise; agency cannot be established by the oral declarations of an agent, nor by any act of his done without the authority or knowledge of his principal.

J. L. PEELER,
Attorney for Defendant.

Given.

T. S. MAXEY, *Judge.*

28 The above charge is given with this explanation:

It is true that the fact of agency cannot be established by the declarations of the agent. And you will therefore disregard the mere declarations of witnesses, professing to act as agents, on that point, and look to the telegrams, letters, and all other evidence in the case to determine whether Baccarisse was the authorized agent of the defendant in making the contracts. If you find that he was the agent of defendant, duly authorized to make the contracts, then acts done by him during the course of his employment and within the scope of his authority, would be binding upon the defendant.

T. S. MAXEY, *Judge.*

Judgment.

In United States Circuit Court, Western District of Texas, at Austin, July Term, 1893.

GEORGE W. RUSS
vs.
Count J. TELFENER. } No. 1918.

Be it remembered that on this, the 6th day of July, 1893, the above styled and numbered cause, to wit: the cause of Geo. W. Russ *vs.* Count J. Telfener, numbered 1918 on the law docket of this court, was duly called for trial, whereupon the plaintiff appeared by his attorneys, Hancock and Shelley and Franz Fiset and C. H. Miller, and the defendant appeared by his attorney, J. L. Peeler, and thereupon both parties, to wit: the plaintiff and the defendant, by their said attorneys, announced ready for trial, and thereupon a jury of twelve good and lawful men, residents and citizens of the western district of Texas, were called, to wit: A. B. Dailey, foreman, and eleven others, who, after having been tried and empanneled, were sworn according to law, well and truly to try and determine the issues joined between said parties, plaintiff and defendant, and true verdict to render on the facts according to the law; thereupon the pleadings of the parties were read to the court and the jury, and the trial of said cause proceeded in the hearing of the court and said jury on the evidence offered by the parties to said cause until the 11th day of July, 1893, and on said 11th day of July, 1893, the cause was argued by counsel of plaintiff and defendant respectively;

and thereupon the jury, having heard the pleadings, evidence, and argument of the parties to said cause, and having received the instructions or charge of the court on the law applicable to said case, on said 11th day of July, retired to consider of their verdict, and having so considered of their verdict, afterwards, to wit: on the same day, the 11th day of July, 1893, returned into open court the following verdict, to wit:

29 We, the jury, find for the plaintiff, and assess his damages as follows:

1st.	Principal amount	$286,080 00
2.	Interest at the rate of 8 per cent. per annum from November 15, 1882, to present time, July 11, 1893	243,867 22
	Total amount of damages	$529,947 22

A. B. DAILEY, *Foreman.*

And said verdict was thereupon accepted by the court and filed by the clerk of said court. And thereupon, on the 12th day of July, 1893, came the plaintiff in this cause by his attorneys, and in open court stated that that part of the verdict of the jury returned in this cause on the 11th day of July, 1893, which awards interest to the plaintiff in the sum of $243,867.22 is excessive to the extent of $11,506.72, because on said principal sum of damages found by said jury, to wit, the sum of $286,080, the plaintiff is only entitled to and claims interest at the rate of eight per cent. per annum from the 15th day of November, 1882, to the 12th day of July, 1891, and from said date he only claims and is entitled to interest at the rate of six per cent. per annum up to the rendition of the said verdict, to wit, the 11th day of July, 1898; the total interest to which plaintiff is thus entitled and which he claims is $232,360.50. And the plaintiff therefore enters in open court a remitter on that part of the verdict stating the interest due plaintiff to the extent of $11,506.72, thus claiming under said verdict only, first, the full amount of the principal damages, to wit, $286,080, and interest on said sum up to the date of the rendition of the said judgment in the sum of $232,360.50, or total of principal and interest of $518,440.50, and plaintiff prays that judgment be entered up for the full amount of the verdict of the jury less said remitter of $11,506.72, to wit, in the sum of $518,440.50; which said remitter was thereupon allowed by the court and entered of record.

It is therefore considered, ordered and adjudged by the court that the plaintiff, George W. Russ, do have and recover of and from the defendant, Count J. Telfener, the sum of five hundred and eighteen thousand four hundred and forty dollars and fifty cents ($518,440.50), (this being the amount assessed by the jury as aforesaid, after deducting from the interest amount of said verdict the sum remitted by the plaintiff as aforesaid), with interest thereon from this the 12th day of July, 1893, at the rate of 6 per cent. per annum, to-

gether with all csost in this behalf expended; for all which let execution issue, etc.

30 *Defendant's Bills of Exceptions.*

Exception No. 1.

GEORGE W. RUSS
vs
Count JOSEPH TELFENER. } No. 1. Defendant's Bill of Exceptions No. 1.

Be it remembered, that during the progress of this cause, the hereinafter ruling and action of the court was at the time the same was made, taken and announced excepted to in open court by the defendant in above-entitled cause, to wit:

The plaintiff was permitted to offer in evidence and read to the jury, over defendant's objection, the following telegrams from C. K. Westcott to C. Baccarisse, and which referred to the lands described in plaintiff's petition, viz:

1. OCT. 25TH, 1882.

To Chas. Baccarisse:

Provided there is at least one million close at eighty, General (meaning the plaintiff) to undertake surveys and perfect things for issuance patent funds for commencing surveys shall be deposited immediately. Expert's favorable report and certified papers reach Count (meaning the defendant), say within time specified by you, commission to be paid on certificate from land office that field-notes are returned and patent will issue in Bosse's name (meaning defendant), he will pay State direct. Sign contract to mail or express certified copy file and map in duplicate. This will save much time and enable inspection probably in six days. Look up Presidio and Pecos affairs, mailing certified papers and maps. Wire before you leave.

C. K. WESTCOTT.

2. OCT. 27TH, 1882.

To C. Baccarisse, San Antonio:

Yours twenty-fifth was answered immediately. Why did you not wait after asking a reply, knowing the thing to be so important? Go back and close at eighty as instructed.

C. WESTCOTT.

3. OCT. 28, 1882.

To C. Baccarisse, S. A.:

You never got my message of twenty-fifth because you did not wait for it. If you have received recent orders from Count (meaning the defendant) not to close at eighty, wire me; if not, close at eighty. General (meaning the plaintiff) to undertake surveys and make everything straight for issuance of patents. Funds for commencing

surveys shall be deposited immediately after expert's favorable
31 report reaches Count (meaning the defendant), say within time specified by you. Commission paid on receipt of certificate from land office, the field-notes are got, and patents will be issued, Count (meaning the defendant) will pay State direct. Sign contract and mail or express certified copy of file and map. This will save much time and enable to have land inspected probably within five or six days.

C. K. WESTCOTT.

4. Nov'r 1, 1882.

To C. Baccarisse:

Accept General's (meaning the plaintiff) offer at twenty-five cents for transfer his file, same to be made as suggested by him after verifying correctness of same with county surveyor and land office records. Send immediately certified copies of file, map and contract.

C. K. WESTCOTT.

And to the introduction in evidence of each of said telegrams defendant objected upon the ground that the plaintiff had not alleged in his petition that C. K. Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said C. Baccarisse to make the contracts sued on, which objections the court overruled; and the defendant now here presents in open court, during the time required by law, and to the judge of the court, for his allowance and signature, this bill of exceptions to the ruling and action aforesaid; and the said bill is now here, in open court, allowed and signed, and ordered to be filed and to constitute a part of the record in this cause.

Signed this the 14th day of July, A. D. 1893.

T. S. MAXEY,
Judge Presiding.

Exception No. 2.

GEORGE W. RUSS *vs.* Count JOSEPH TELFENER. } No. 1918. Defendant's Bill of Exception No. 2.

Be it remembered, that during the progress of this cause, after all the evidence for plaintiff and defendant had gone to the jury and the law of the case had been argued to the court and the facts to the jury, the court of its own motion, among other things, charged the jury as follows:

"If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it. * * *

"If you find from the evidence that Baccarisse had au-
32 thority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created."

The defendant, in open court, specially excepted to the giving of the charge herein set out at the time the same was read to the jury, upon the ground that there were no pleadings on the part of plaintiff authorizing such a charge, but the court refused to correct its error, and defendant now presents this bill of exception to the court, and prays that the same be allowed and signed and caused to be enrolled as part of the record in this case, which is accordingly done in open court and within the time allowed by law.

Signed this the 13th July, A. D. 1893.

T. S. MAXEY,
Judge Presiding.

Exception No. 3.

GEORGE W. RUSS *vs.* Count JOSEPH TELFENER. } No. 1918. Defendant's Bill of Exception No. 3.

Be it remembered that during the progress of this cause, the only testimony introduced in evidence, by either the plaintiff or defendant, as to when the plaintiff filed his applications with the county surveyor of El Paso county for the survey of the 1,813 sections of land described in his petition; or as to when the said lands were surveyed; or as to when the field-notes of the surveys were returned to the general land office; or as to what lands the plaintiff's applications included, was the following:

1. Plaintiff introduced in evidence certified copies of two applications made by him for the survey of the 1,813 sections of land mentioned in his petition, and which were addressed to and filed by the county surveyor of El Paso county on October 4th and 5th, 1882, respectively.

2. Plaintiff next introduced in evidence the following certified copy from the commissioner of the general land office, viz: General land office, Austin, Texas. I, R. M. Hall, commissioner of the general land office of the State of Texas, in accordance with the provisions of article 2253 of the Revised Statutes of the State of Texas, do make the following certificate of facts, viz: On the 8th day of January, 1883, there was filed in this office by George W. Russ field-notes of one thousand eight hundred and thirteen surveys of land situated in El Paso county, Texas, and surveyed for said Geo.
W. Russ under the provisions of an act of the legislature ap-
33 proved July 14, 1879, and amendatory act of March 11th, 1881, authorizing the sale of a portion of the public domain.

The field-notes of said surveys call for 640 acres each, situated in blocks A, B, C, D, E, F, G, H, I, J, and K, in El Paso county, Texas.

On the said 8th day of January, 1883, the said Geo. W. Russ filed in this office two applications or files, by virtue of which applications or files said 1813 surveys were made. Neither of said applications bear any date upon their face. On the back of one of said applications is the following endorsement, viz: "Filed for record this 4th day of October, 1882, at 4.40 o'clock p. m. A. M. Randolph, Co. sur., El Paso Co., Texas. Recorded in Book No. 1, pages 68, 69, and 70, this the 7 day of November, A. D. 1882. A. M. Randolph, sur. El Paso Co., Tex." On the back of the other application is the following endorsement, viz: "Filed for record this 5th day of October, 1882, at 6 o'clock p. m. A. M. Randolph, Co. sur., El Paso Co., Tex.," and recorded November 3d, 1882, 4.30 p. m.

The dates of said surveys, as given in their respective field-notes, are as follows, viz:

Surs. 1, 2, 4, 5, and 24 to 49, incl., block A, dated Oct. 20, 1882.
Surs. 50 to 108, incl., block A, dated Oct. 21, 1882.
Surs. 109 to 222, incl., block A, dated Oct. 22, 1882.
Surs. 223 to 320, incl., block A, dated Oct. 23, 1882.
Surs. 321 to 399, incl., block A, dated Oct. 24, 1882.
400 to 421, incl., block A, dated Oct. 25, 1882.
51 to 96, incl., block B, dated Oct. 16, 1882.
51 to 64, incl., block C, dated Oct. 26, 1882.
65 to 200, incl., block C, dated Oct. 27, 1882.
201 to 236, incl., block C, dated Oct. 29, 1882.
1 to 36, incl., block D, dated Oct. 18, 1882.
37 to 54, incl., block D, dated Oct. 19, 1882.
1 to 72, incl., block E, dated Oct. 27, 1882.
73 to 150, incl., block E, dated Oct. 28, 1882.
151 to 236, incl., block E, dated Oct. 31, 1882.
237 to 333, incl., block E, dated Nov. 1, 1882.
334 to 348, incl., block E, dated Oct. 30, 1882.
1 to 60, incl., block F, dated Oct. 30, 1882.
161 to 289, incl., block F, dated Oct. 31, 1882.
290 to 384, incl., block F, dated Oct. 30, 1882.
1 to 16, incl., block G, dated Nov. 3, 1882.
1 to 10, incl., block H, dated Nov. 3, 1882.
1 to 48, incl., block I, dated Nov. 3, 1882.
1 to 24, incl., block J, dated Nov. 9, 1882.
1 to 76, incl., block K, dated Oct. 13, 1882.

34 Receipts of the state treasurer on file in this office show that the purchase-money—50 cents per acre—was paid on twenty-five of the aforementioned surveys, viz., surveys 1 to 16, inclusive, in block G, and surveys 35 to 44, inclusive, in block I. There is no evidence that the purchase-money was paid on the others. Said surs. all purport to have been made by A. M. Randolph, sur., El Paso county.

I certify that the above and foregoing is a true and correct statement of facts, as shown from the files and records of this office.

In testimony whereof I hereunto set my hand and affix the impress of my official seal this February 19, 1887.

[SEAL.] R. M. HALL,
Comm'r Gen'l Land Office.

Endorsed in the following words, to wit:
Ex. Z. Filed Febr'y 25, A. D. 1887. Sam. Hopkins, clerk.

3. M. E. Groos, chief clerk of the general land office, testified that the plaintiff's application filed on Oct. 5th, 1882, as aforesaid, covered sections 1 to 48, inclusive, in block "I," of said certificate.

4. S. W. S. Duncan testified that the lands were surveyed on the dates mentioned in their respective field-notes.

And be it further remembered, that after the above-mentioned evidence had gone to the jury and the law of the case had been argued to the court and the facts to the jury, the court, of its own motion, among other things, charged the jury as follows: You are further instructed, that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could lawfully be assigned.

And be it further remembered, that before the jury had retired to consider of their verdict, the defendant, for the purpose of correcting the error in the charge of the court, above complained of, as well as the omission in the charge, and for the further purpose of having the law of the case given the jury as applied to the facts appearing in this bill of exception, presented in writing to the court, and before the jury had left the bar, the following special instructions:

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 13.

Defendant asks the court to charge the jury as follows:

The court instructs the jury, that the "right, title, and interest" of plaintiff, in his application and files on hand, and which he contracted to sell, was not a vested right on the first day of No-
35 vember, 1882, in or to any lands surveyed after that date.

The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider or include in the measure of damages.

J. L. PEELER,
Attorney for Defendant.

Endorsed in the following words, to wit: No. 1918. Geo. W. Russ *vs.* Count Joseph Telfener. Defendant's special charge No. 13. Filed July 11, 1893. D. H. Hart, clerk. Refused. T. S. Maxey, judge.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 14.

Defendant asks the court to charge the jury as follows:

You are instructed that the law required the field-notes of the land to be returned to and filed in the general land office within sixty days after the same was surveyed. The evidence shows that the field-notes of only twenty-four sections of land were returned to and filed in the general land office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land.

J. L. PEELER,
Attorney for Defendant.

Endorsed in the following words, to wit:

No. 1918. Geo. Russ *vs.* Count Joseph Telfener. Defendant's special charge No. 14. Filed July 11, 1893. D. H. Hart, clerk. Refused. T. S. Maxey, judge.

The defendant, Count Joseph Telfener, specially excepted to that part of the court's charge herein set out at the time the same was read to the jury, but the court refused to correct its error, or to give to the jury either one of the defendant's said special instructions, numbers 13 and 14; to all of which rulings of the court the defendant then and there in open court excepted, before the jury had retired, and now presents this bill of exception to the court, and prays that the same be allowed and signed, and caused to be enrolled as part of the record in this case, which is accordingly done in open court and within the time allowed by law.

Signed this 13th July, A. D. 1893.

T. S. MAXEY,
Judge Presiding.

Exception No. 4.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Defendant's Bill of Exception No. 4.

Be it remembered, that during the progress of this cause, the hereinafter ruling and action of the court was at the time the
36 same was made, taken, and announced excepted to in open court by the defendant in above-entitled cause, to wit:

F. M. Maddox was a witness in this case, and testified that A. M. Randolph, who was county surveyor of El Paso county, Texas, in 1882, is dead and that he died four or five years ago. This witness further testified that he was a surveyor and had surveyed a great deal of land in the western portion of the State and in the Pan Handle; that it was four miles around each section of land of 640 acres; that 58 sections of land could not be surveyed in a day by one surveyor; that 113 sections of land could not be surveyed in a day by one surveyor; that 97 sections of land could not be surveyed

in a day by one surveyor; that 78 sections of land could not be surveyed in a day by one surveyor; that 45 sections of land could not be surveyed in a day by one surveyor; that 135 sections of land could not be surveyed in a day by one surveyor; that 35 sections of land could not be surveyed in a day by one surveyor; that 36 sections of land could not be surveyed in a day by one surveyor; that 72 sections of land could not be surveyed in a day by one surveyor; that 77 sections of land could not be surveyed in a day by one surveyor; that 85 sections of land could not be surveyed in a day by one surveyor; that 96 sections of land could not be surveyed in a day by one surveyor; that 60 sections of land could not be surveyed in a day by one surveyor; that 128 sections of land could not be surveyed in a day by one surveyor; that 94 sections of land could not be surveyed in a day by one surveyor; that 48 sections of land could not be surveyed in a day by one surveyor; that 76 sections of land could not be surveyed in a day by one surveyor; that the average number of miles that a man can survey in one day is 10 to 15 miles, but that he had run 28 miles on one occasion, but never but once; and on the occasion he surveyed 28 miles he rode on horseback over level prairie country, and had six flagsmen (front and back flagsmen), and never stopped to build a corner, and that the chainmen never stopped, and that they worked from sun up to sun down.

Only one man can handle the compass—do the scientific work, and the assistance of a large number of flagsmen and chain-carriers would not aid him in making speed.

On cross-examination by the plaintiff this same witness testified that by putting only two corners to each survey, you could, as an illustration, survey block "J," containing 24 sections, by running only 14 miles; that the distance around one section was 4 miles, which makes a total distance of 96 miles around 24 sections of land; that the more surveyors you have the more work you can do; that one surveyor could sorter supervise the other surveyors, but that he could not be with each surveying party, but could direct their
37 general movements; that the amount of work that could be done would increase according to the number of surveyors employed at a specified time, and the number of sections one surveyor could survey depends upon the number of men he has with him; and that the additional number of men would facilitate the surveyors in crossing streams, making set-offs, etc.

On redirect examination by the defendant, said witness testified that block "J" contained 24 sections and could by making only two corners to each survey be surveyed by running only 14 miles, but that 24 sections of land could be surveyed by running 14 miles if four corners were made to each section, and if the surveyor only run 14 miles he would then be calling for corners that he had not made. Recross-examined, witness said that would be actual surveying on the the ground; that is, what is termed actual surveying on the ground is work done on the ground by which you could identify a survey. This work would be that kind.

S. W. S. Duncan, witness for plaintiff, testified by deposition. As

agent of plaintiff, that he made application and filed on the 1813 sections referred to in this suit. I made a contract for plaintiff with the county surveyor of El Paso county for making the surveys of said sections. There was employed by me in the survey and making the field-notes, between 20 and 30 people all together. I employed the county surveyor, and all of his assistants and myself helped in making the survey and superintending the matter from making the application to finally turning the field-notes over to plaintiff to file in the general land office. I do know that the survey was made and the field-notes returned to the general land office because I superintended the survey and helped to take the field-notes to the office, and saw plaintiff pay the filing fee of ($1.00) one dollar per section. On cross-examination the same witness testified that it was impossible for him to state by whom any section of the land in question was surveyed.

Upon the trial of the case, plaintiff admitted that the said A. M. Randolph's name is signed to each of the 1813 sets of field-notes of the 1813 sections of land described in his petition.

The said Maddox was the only surveyor that testified in this case.

And be it further remembered, that before the jury had retired to consider of their verdict, the defendant, for the purpose of correcting an omission in the court's charge, and for the further purpose of having the law of the case given to the jury as applied to the fact appearing in this bill of exceptions, presented in writing to the court and before the jury had left the bar the following special instruction:

38 GEORGE W. RUSS *vs.* COUNT JOSEPH TELFENER. } No. 1918. Special Charge No. 16.

Defendant asks the court to charge the jury as follows:

If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the ground, then and in such case they are instructed that such surveys are void, and for such sections plaintiff cannot recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant.

J. L. PEELER,
Attorney for Defendant.

Endorsed in following words, to wit:

No. 1918. Geo. W. Russ *vs.* Count Joseph Telfener, defendant. Defendant's special charge No. 16. Filed July 11, 1893. D. H. Hart, clerk. Refused. T. S. Maxey, judge.

The court refused to give to the jury said special instruction number 16; to which ruling of the court the defendant then and there in open court excepted, before the jury retired, and now presents this bill of exceptions to the court, and prays that the same be allowed

and signed, and caused to be enrolled as part of the record in this case, which is accordingly done in open court and within the time allowed — law.

Signed this the 13th day of July, A. D. 1893.

T. S. MAXEY,
Judge Presiding.

Telfener's Petition for Writ of Error.

UNITED STATES OF AMERICA:

To the honorable judges of the United States circuit court of appeals for the fifth circuit:

Now comes Count Joseph Telfener by his attorney of record, J. L. Peeler, and respectfully represents to your honors in cause No. 1918, wherein he was defendant and George W. Russ was plaintiff, pending in the United States circuit court, fifth circuit and western district of *of* Texas, at Austin, judgment was rendered at the July term thereof, 1893, against him and in favor of said Russ for the sum of $518,440.50, on or about the 12th day of July, 1893, and that in the record, proceedings, and rendition of the judgment in said cause manifest error hath intervened to the great damage of him, the said Telfener; wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by said United States circuit court of appeals, etc.

J. L. PEELER,
Attorney for Defendant Telfener.

Allowed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

39 *Telfener's Assignment of Errors.*

GEORGE W. RUSS
vs.
COUNT JOSEPH TELFENER.

No 1918. Suit Pending in United States Circuit Court, Western District of Texas, at Austin.

Now comes Count Joseph Telfener, defendant in the above-styled cause, and assigns the following errors:

First Assignment of Error.

The court erred in permitting the plaintiff, George W. Russ, to offer in evidence and read to the jury, over defendant's objection, the following telegrams from C. K. Westcott to C. Baccarisse, to wit:

1. OCT. 26, 1882.

To Chas. Baccarisse:

Provided there is at least one million (meaning acres of land), close at eighty, General (meaning the plaintiff) to undertake surveys and perfect things for issuance patent. Funds for commencing sur-

veys shall be deposited immediately. Expert's favorable report and certified papers reach Count (meaning the defendant) say within time specified by you. Commission to be paid on certificate from land office that field-notes are returned and patent will issue in Bosses' name (meaning defendant), he will pay State direct. Sign contract to mail or express certified copy file and map in duplicate; this will save much time and enable inspection probably in six days. Look up Presidio and Pecos affairs, mailing certified papers and maps. Wire before you leave.

C. K. WESTCOTT.

2. OCT. 27TH, 1882.

To C. Baccarisse, San Tone:

Yours twenty-fifth was answered immediately. Why did you not wait after asking a reply knowing the thing to be so important. Go back and close at eighty as instructed.

C. K. WESTCOTT.

3. OCT. 28, 1882.

To C. Baccarisse, S. A.:

You never got my message of twenty-fifth because you did not wait for it. If you have received recent orders from Count (meaning the defendant) not to close at eighty wire me, if not, close at eighty. General (meaning the plaintiff) to undertake surveys and make everything straight for issuance of patents. Funds for commencing surveys shall be deposited immediately after expert's favorable report reaches Count (meaning the defendant), say within time specified by you. Commission paid on receipt of certifi-
40 cate from land office, the field-notes are got and patents will be issued. Count (meaning the defendant) will pay State direct. Sign contract and mail or express certified copy of file and map. This will save much time and enable to have land inspected probably within five or six days.

C. K. WESTCOTT.

4. NOV'R 1, 1882.

To C. Baccarisse:

Accept General's (meaning the plaintiff) offer at twenty-five cents for transfer his file, same to be made as suggested by him after verifying correctness of same with county surveyor and land-office records. Send immediately certified copies of file, map, and contract.

C. K. WESTCOTT.

And to the introduction in evidence of each of said telegrams, defendant objected upon the ground that the plaintiff had not alleged in his petition that C. K. Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said C. Baccarisse to make the contracts sued on, and all of which more fully appears from the defendant's bill of exceptions number one.

Second Assignment of Error.

The court erred in charging the jury as follows:

If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it.

If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created.

The defendant specially excepted to the giving of the charge herein set out at the time the same was read to the jury, upon the ground that there were no pleadings upon the part of plaintiff authorizing such a charge, as is fully shown by defendant's bill of exceptions number two.

Third Assignment of Error.

The court erred in refusing to give to the jury defendant's special charge number thirteen, which is as follows:

41 GEORGE W. RUSS *vs.* COUNT JOSEPH TELEFNER. } No. 1918. Special Charge No. 13.

Defendant asks the court to charge the jury as follows:

The court instructs the jury that the "right, title, and interest" of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the first day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November first, 1882, you will not consider or include in the measure of damages.

J. L. PEELER,
Attorney for Defendant.

As is shown by defendant's bill of exceptions number three.

Fourth Assignment of Error.

The court erred in refusing to give to the jury defendant's special charge number fourteen, which is as follows:

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 14.

Defendant asks the court to charge the jury as follows:
You are instructed that the law required the field-notes of the land to be returned to and filed in the general land office within sixty days after the same was surveyed. The evidence shows that the field-notes of only twenty-four sections of land were returned to and filed in the general land office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land.

J. L. PEELER,
Attorney for Defendant.

As is shown by defendant's bill of exceptions number three.

Fifth Assignment of Error.

The court erred in refusing to give to the jury the defendant's special charge number sixteen, which is as follows:

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Special Charge No. 16.

Defendant asks the court to charge the jury as follows:
If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the ground, then and in such case they are instructed that such
42 surveys are void and for such sections plaintiff cannot recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant.

J. L. PEELER,
Attorney for Defendant.

As is shown by defendant's bill of exceptions number four.

Sixth Assignment of Error.

The court erred in overruling defendant's motion for a new trial and in not setting aside the verdict rendered herein and granting him a new trial.

Wherefore the said defendant, Telfener, prays that the honorable

United States circuit court of appeals for the fifth circuit reverse the judgment rendered herein against him and remand this cause for a new trial.

J. L. PEELER,
Attorney for Defendant Telfener.

Cost Bond on Writ of Error.

GEORGE W. RUSS
vs.
Count JOSEPH TELFENER. } No. 1918. Cost Bond on Writ of Error.

Whereas, in the above numbered and entitled cause, pending in the United States circuit court, fifth circuit and western district of Texas, at Austin, and at a regular term of said court, to wit, on or about the 12th day of July, 1893, the said George W. Russ recovered judgment against the said Count Joseph Telfener for the sum of $518,440.50, with interest thereon from said date at the rate of six (6) per cent. per annum, and all costs of suit, and from which judgment the said Count Joseph Telfener has sued out a writ of error to the United States circuit court of appeals for the fifth circuit:

Now, therefore, we, Count Joseph Telfener, as principal, and Frank Hamilton and Wm. C. Lott, as sureties, acknowledge ourselves bound to pay the said George W. Russ the sum of $1,000, conditioned that the said Count Joseph Telfener shall prosecute his writ of error to effect, and answer all costs only if he fails to make his plea good.

Witness our hands this the 9th day of August, 1893.

COUNT JOSEPH TELFENER,
Per J. L. PEELER, *Attorney.*
FRANK HAMILTON.
WM. C. LOTT.

Examined and approved this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

43 (Endorsed:) No. 1918. Geo. W. Russ *vs.* Count Joseph Telfener. Cost bond on writ of error. Filed Aug. 9th, 1893. D. H. Hart, clerk, by A. F. Robbins, dep-ty.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court before you, between George W. Russ, who is plaintiff, and Count Joseph Telfener, who is defendant, No. 1918 on the docket of said circuit court of the United States, sitting at Austin, in said district, a manifest

error hath happened, to the great damage of the said Count Joseph Telfener, who is plaintiff in error herein, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, 30 days from this date, together with this writ, so that you have the same at the city of New Orleans, State of Louisiana, in said United States circuit court of appeals for the fifth circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 9th day of August, in the year of our Lord one thousand eight hundred and ninety-three, and seal — our said circuit court, at Austin, in the 117th years of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court U. S.,
West. Dist. of Texas, at Austin,
By A. F. ROBBINS, *Dep-ty.*

Allowed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 1918. In U. S. circuit court of appeals for 5th circuit, New Orleans, La. Count Joseph Telfener, pl't'ff in error, *vs.* Geo. W. Russ, def't in error. Writ of error to U. S. circuit court of appeals for the 5th circuit. Issued 9th day of August, 1893. D. H. Hart, clerk, by A. F. Robbins, deputy.

44 *Citation in Error.*

The President of the United States to George W. Russ, or his attorneys of record, Mess. Fiset & Miller, Greeting:

You are hereby cited and admonished to be and appear at and before the United States circuit court of appeals for the fifth circuit in the city of New Orleans, State of Louisiana, thirty (30) days from this date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Texas—fifth circuit—sitting at Austin—

Wherein Count Joseph Telfener is plaintiff in error and you are defendant in error, to show cause, if any there he, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Test with seal of court at Austin, this 9th day of August, A. D. 1893.

Signed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

[SEAL.] D. H. HART,
Clerk Circuit C't U. S., West. Dist. of Texas, at Austin,
By A. F. ROBBINS, *Dep-ty.*

AUG. 14TH, 1893.

We hereby waived being served with copy of foregoing citation and accept service.

FISET & MILLER,
Attorneys for George W. Russ.

(Endorsed:) No. 1918. In U. S. circuit court of appeals for 5th circuit, New Orleans, La. Count Joseph Telfener, plaintiff in error, *vs.* Geo. W. Russ, defendant in error. Citation in error. Issued 9th day of August, 1893, D. H. Hart, clerk, by A. F. Robbins, dep-ty. Filed Aug. 14, '93. D. H. Hart, clerk, by A. F. Robbins, dep-ty.

THE UNITED STATES OF AMERICA, }
Western District of Texas, }

I, D. H. Hart, clerk of the circuit court of the United States in and for the western district of Texas, do hereby certify that the above and foregoing on 69 pages contains a full, true, and correct copy of the proceeding had and orders entered in cause No.
45 1918, of George W. Russ *vs.* Count Joseph Telfener, as the same appears of record and on file in this office.

Witness my hand and the seal of said circuit court at Austin, this 22d day of August, A. D. 1893.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART, *Clerk,*
By A. F. ROBBINS, *Deputy.*

46 *Hearing and Submission.*

November Term, 1893.

WEDNESDAY, *January* 24, 1894.

Extract from minutes.

COUNT JOSEPH TELFENER, Plaintiff in Error, }
v.
GEORGE W. RUSS, Defendant in Error. }

This cause was regularly called this day, and after argument by Mr. J. L. Peeler, for plaintiff in error, and by Mr. Franz Fiset and Mr.

Charles Fred. Tucker, for defendant in error, was submitted for the consideration of the court.

Judgment.

November Term, 1893.

TUESDAY, *February* 6, 1894.

Extract from minutes.

47 Count JOSEPH TELFENER, Plaintiff in Error,
v.
GEORGE W. RUSS, Defendant in Error.

This cause came on to be heard on the transcript of the record of the circuit court of the United States for the western district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Count Joseph Telfener, and the sureties on the writ of error bond herein, Frank Hamilton and Wm. C. Lott, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

And afterwards, to wit, on the 7th day of March, 1894, a petition for rehearing was filed in the said cause in the words and figures following, to wit:

48 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1893.

Count JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error. } No. 183.

Error to United States circuit court, fifth circuit and western district of Texas, at Austin.

Motion for Rehearing by Plaintiff in Error.

Now comes Count Joseph Telfener, plaintiff in error in the above-styled cause, and moves this honorable court to set aside its judgment of affirmance rendered herein on the 6th day of February, 1894, and grant him a rehearing, for the following reasons:

First.

Because this honorable court held that the first and second assignments of error were not well taken; and that the question of agency was raised by the pleadings, sufficient to fully inform each

party that the lawful agency of both Baccarisse and West-
49 cott would be an issue in the case, and that the amended answer impliedly admitted the agency of Westcott.

Now, in all seriousness, we contend that it is incumbent upon a party proposing to prove agency, to first plead it. This being true, let us see if the defendant in error did plead that C. K. Westcott was the agent of plaintiff in error. By an examination of his petition we find that he does not even refer to Westcott, therefore, for him to have proven that Westcott was the agent of the plaintiff in error or was authorized to instruct Baccarisse to execute the contracts in suit, he had to do so, if at all, by virtue of the answer of the plaintiff in error; and by reference to the answer, it is seen, after giving it a most liberal interpretation, that the plaintiff in error simply plead that if Baccarisse ever had authority to negotiate in the purchase of lands in Texas, it was merely as an employé under Westcott, but that neither Westcott nor any other person had a right to execute the contracts. The plaintiff in error did not allege that Westcott was his agent unless it was by implication; and we submit that such an implication could not benefit the defendant in error, because under every authority on this question, American and English, it is well settled that when a material fact is omitted on one side but referred to on the other, such fact must be directly averred, not by implication, but expressly pleaded, before the other side can take advantage of or introduce testimony under it.

We further contend, that if the plaintiff in error had even admitted that Westcott was his agent, it would not have availed the defendant in error anything, because the third count of the answer consisted of a general denial, which put the defendant in error upon proof of his entire case, regardless of whatever else the plaintiff in error may have plead. Fowler *v.* Davenport, 21 Texas, 626, and authorities cited.

50 Second.

Because this honorable court held that the third assignment of error was not well taken, and that the defendant in error had a valuable and assignable right on the 1st day of November, 1882, in all the lands surveyed after that date.

Our position before the Supreme Court of the United States, and on the last trial of this case, was not the same. Before the Supreme Court we contended that the defendant in error had no right or assignable interest whatever in any of the eighteen hundred and thirteen sections of land. But the record there as well as here showed that all the sections, except ninety-eight, had been surveyed on and prior to the 1st day of November, 1882, the day on which the contracts were made. And thus, under the case of Jumbo Cattle Co. *v.* Bacon and Graves, 79 Texas, 5, the Supreme Court, without specially noticing the ninety-eight sections, intimated that the defendant in error had a valuable and assignable right in the lands.

On the last trial of this case, as well as here, however, our posi-

tion was quite different; it was that the defendant in error only had a valuable interest in the lands surveyed on and prior to the 1st day of November, 1882, and that he had no interest at all, none which the courts could recognize or enforce, in the ninety-eight sections surveyed after that date; nor do we understand the Supreme Court as holding that he had any interest in the ninety-eight sections; they could not have done so, because the supreme court of Texas, in construing the act of 1879, had expressly held otherwise, and it is our understanding that the Federal courts, in interpreting a statute of a State, always follow the interpretation placed on it by the courts of that State, especially in matters of this kind. The interest that the defendant in error had on the 1st day of No-
51 vember, 1882, in the ninety-eighth sections of land surveyed after that date, was just such an interest as every other citizen, domestic or foreign, possessed—no more and no less; it was a piece of moonshine which he neither owned, controlled, nor could assign. Judge Stayton, the present chief justice of the supreme court of Texas, in discussing this identical question in the case of White *v.* Martin, 66 Texas, 344, said that "no right should be deemed to vest in an applicant prior to a survey, prior to which time it might be appropriated by a pre-emptor, or by any responsible person, without infringing any vested right of a former applicant," and which was reaffirmed in Jumbo Cattle Co. *v.* Bacon and Graves, 79 Texas, *supra*.

Third.

Because this honorable court held that the fourth and fifth assignments of error were not well taken, and that it was wholly immaterial whether the surveys under the applications of the defendant in error were made and returned to the general land office within sixty days, or were returned at all; and also, whether the surveys made under the applications were actually made on the ground or consisted of office work.

It was the duty of the defendant in error to have had the field-notes returned to and filed in the general land office within the time prescribed by law. He contracted to and did have them returned and filed, but it was after the expiration of the sixty days, except as to twenty-four sections, and hence every right was lost. It is true that section 3 of the act of 1879 required the surveyor to return and file the field-notes, but in performing such a duty he represented the person who had made the application, and paid him for his services, and nobody else; and it was the applicant's duty to see that the field-notes were returned and filed in
52 time, and if they were not, then he should suffer the loss. Section 9 of the act provided that should any applicant fail, refuse, or neglect to pay for the land, he should forfeit all rights thereto and should not thereafter be allowed to purchase the same. Now did this forfeiture and prohibition apply to the plaintiff in error? Certainly not, because he was not an applicant—he had not made any application, nor had he caused any lands to be surveyed and the field-notes of same returned to the general land office.

After a forfeiture had been declared, the plaintiff in error could have filed on these identical lands and have purchased them. The forfeiture provided in section 9 is reasonable. It is contained in the last section of the act, and was intended to apply only to those persons who had made the application, who had caused the land to be surveyed within ninety days, the field-notes of same made out and returned within sixty days, and who then refused to pay for the land.

Again, if the surveys were not made on the ground then they were void. Bacon *et al. v.* State, 21 S. W. Rep., 149. And being void, the matter stood as if no survey had been made at all. Without a valid survey, as already seen, there was no right, title, or interest which the law could recognize.

Plaintiff in error respectfully represents that Franz Fiset and Clarence H. Miller, who reside in the city of Austin, State of Texas, are counsel for the defendant in error, wherefore he prays that said counsel be duly notified of this motion, if necessary, and that a rehearing be granted, etc.

J. L. PEELER,
Counsel for Plaintiff in Error.

I hereby certify that the foregoing is the motion for rehearing of the plaintiff in error in the above-styled cause, and that the same is made in good faith.

J. L. PEELER,
Counsel for Plaintiff in Error.

53 *Rehearing Refused.*

November Term, 1893.

TUESDAY, *May* 29, 1894.

Extract from minutes.

Count JOSEPH TELFENER, Plaintiff in Error,
v.
GEORGE W. RUSS, Defendant in Error.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, refused.

54 *Opinion.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1893.

(Filed February 6, 1894.)

Count JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error. } No. 183.

Error to the circuit court of the United States for the western district of Texas.

Before Pardee, circuit judge, and Toulmin, district judge.

PARDEE, circuit judge, delivered the opinion of the court:

This case has been once before the Supreme Court of the United States and is reported in 145 U. S., 522; that report contains a
55 full statement of the general merits and pleadings in the case.

In the Supreme Court two questions were presented—first, whether the plaintiff below acquired any assignable interest in the real property described in the contract upon which the action was brought, and, second, assuming that he had an assignable interest, whether the rule for the measure of damages for breach of the contract for such interest by the defendant was correctly stated to the jury by the court.

The first question was discussed, but not decided. The court, however, intimated "that if a right to purchase land for however short a period is vested in one it is a valuable right, and is in that sense property, and in the absense of express prohibition would be therefore assignable."

The case was reversed and remanded because of error in the charge of the trial court as to the measure of damages. On the second trial there was another verdict for the plaintiff in the court below, and the case is brought here for review on several assignments of error, which will be considered in order.

The first assignment of error relates to permitting the plaintiff to offer in evidence and read to the jury over defendant's objection certain telegrams from one C K. Wescott to one C. Baccarisse in regard to executing the contract between plaintiff and defendant sued on, and the second assignment of error complains of the charge to the jury as follows:

56 "If from consideration of the evidence you conclude that Baccarisse had authority direct from the defendant to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Wescott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it.

If you find from the evidence that Baccarisse had authority from the

defendant or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879 by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created."

The contract sued on purported to have been executed on the part of the plaintiff in error by one C. Baccarisse, agent.

The amended answer denies the authority of C. Baccarisse as agent, but impliedly admits the agency of C. K. Westcott, so that the question of agency was substantially raised by the pleading, and the evidence tending to support or disprove the agency of either Baccarisse or Westcott could work no surprise. The bill of exceptions taken to the admission of the evidence complained of and to the charge of the trial court in relation to such evidence con-
57 tains no statement of the facts otherwise proved or attempted to be proved in relation to agency so as to enable this court to determine whether the evidence objected to was or was not admissible or whether the charge of the court was relevant. The objection assigned to the admission of the evidence and to the charge of the court is that the plaintiff did not allege in his pleadings that Westcott was the defendant's agent or that the said Westcott was authorized to impower the said Baccarisse to make the contract sued on.

As we have seen, the question of agency was raised by the pleadings so far as to fully inform each party that the lawful agency of both Baccarisse and Westcott would be an issue in the case.

The charge of the court implies that evidence had been offered tending to show that Westcott had authority as agent of the plaintiff in error to impower Baccarisse, and that there was also evidence tending to show that Baccarisse had authority direct from the plaintiff in error himself. In either case the evidence objected to was admissible and the charge complained of was proper. As the case is presented to us under the bill of exceptions, however, we are unable to determine the admissibility of the one or the propriety of the other.

The third assignment of error is the refusal of the trial court to charge the jury as follows:

58 "The court instructs the jury that the 'right, title and interest' of plaintiff in his application and files on lands and which he contracted to sell was not a vested right on the 1st day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November first, 1882, you will not consider or include in the measure of damages."

The evidence relating to this matter shows that the plaintiff had made application in two instruments of writing for the survey of 1,813 sections of land described in his petition which was addressed to and the applications filed by the county surveyor of El Paso

county on October 4th and 5th, 1882, respectively. It shows also that the surveys of said land for which said Russ had made application were made at and prior to the time of the execution of the contract sued on saving and excepting 98 sections of 640 acres each, surveys of which were made between November 1st and November 9th, 1882. These surveys were filed in the general land office on the 8th day of January, 1883. The instrument executed between the plaintiff and the defendant November 1, 1882, was an executory contract by which the plaintiff, for and in consideration of a sum of money promised to be paid by the defendant, agreed on the 15th
59 day of November, 1882, to transfer and assign to defendant all his right, title, and interest in and to the land in question acquired by virtue of plaintiff's application. This contract was a valid and binding contract at the time it was entered into unless it was prohibited by law or public policy which is not contended.

Under this state of the law and of the evidence the instruction asked for did not present the law of the case, and, if technically correct as a general proposition, was calculated to mislead, and was therefore properly refused. The actual charge of the court given in this regard is as follows: "You are further instructed that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could be lawfully assigned," and it seems to have correctly presented the law of the case.

The fourth assignment of error complains of the refusal of the trial court to charge the jury as follows:

"You are instructed that the law required the field-notes of the land to be returned to and filed in the general land office within sixty days after the same was surveyed. The evidence shows that the field-notes of only twenty-four sections of land were returned to and filed in the general land office within said sixty days,
60 therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land."

This assignment relating to the filing in the general land office of the surveys made under the application of the plaintiff in the court below may be disposed of with the 5th assignment of error, which relates to a question as to whether the surveys made under the plaintiff's application and returned to and filed in the general land office were actual surveys on the ground or were "chimney-corner" or office surveys.

In the view that we take of the case it is wholly immaterial whether the surveys made under the application of the plaintiff and returned to the general land office were made and returned within sixty days after the date of the survey or were returned at all, and also whether the surveys made under the said application were actually made on the ground or were office surveys.

With regard to the return of the surveys to the general land office with the field-notes within sixty days after the date of the survey, a reference to the law will show that the duty of making such return devolved not upon the applicant, but upon the sur-

veyor, and that the failure to make such return within the time on the part of the surveyor is not a reason for forfeiture under the terms of the act.

The 9th section of the act is the only section of the same
61 which provides for the forfeiture of the rights secured by the application, and that provision is that should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of the act he shall forfeit all rights thereto, and he shall not be allowed thereafter to purchase the same. But be this as it may, the contract sued on is an agreement to transfer from Russ to Telfener all and singular the rights, title, and interest that the said Russ now has or may be entitled to in and to said lands by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that if such actual surveys had been made he (Russ) would cause them to be returned and filed in the general land office at any time or in any manner whatever. The contract made the same day between the same parties provided that Russ, at his own proper cost and expense, should make all the surveys, field-notes, and maps of the said lands and file them in the office of the surveyor of El Paso county and in the general land office of the city of Austin, Texas, in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made under the contract first mentioned at the time agreed on, to wit, November 15, 1882.

As it is conceded that Telfener made default under the first-mentioned
62 contract on the 15th of November, 1872, and that the sale and transfer under said contract was never carried out, the second mentioned contract became wholly inoperative and irrelevant, and the rights of the plaintiff became fixed, definite, and certain on the 15th of November, 1882, at the time defendant Telfener made default. Under these circumstances we fail to perceive any obligation resting upon Russ to either complete the surveys or file the same in the general land office. Whatever was done by Russ after the 15th of November to perfect the surveys and file the same was done at his own cost and at his own risk, and could in no wise affect the plaintiff in error, Telfener, because the rule for damages in the case was, as declared by the supreme court in Telfener *v.* Russ, *supra*, as follows:

"On the 15th of November he (Russ) possessed all the right to the land which he ever possessed, and assuming that the defendant then failed to make the payment which he had agreed to make all the damages suffered by the plaintiff was the difference between the value of the right as stipulated to be paid and the amount which could then have been obtained on its sale."

The 6th assignment of error is that the court erred in overruling the defendant's motion for a new trial and in not setting aside the verdict rendered and granting a new trial.

It is well settled that a refusal to grant a new trial cannot be assigned as error. On the record as presented to us we find no

reversible error, and therefore we are compelled to affirm the judgment.

63 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing sixty-two pages, numbered from one to sixty-three, inclusive, contain a true copy of the record, pleas, proceedings, opinion, and all papers in the case of Count Joseph Telfener, plaintiff in error, *v.* George W. Russ, defendant in error, No. 183, November term, 1893, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeal at the city of New Orleans this 31 day of July, A. D. 1894.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

64 UNITED STATES OF AMERICA, *ss:*

The president of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Count Joseph Telfener is plaintiff in error, and George W. Russ is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
65 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

66 I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, in obedience to the within and foregoing writ of certiorari, commanding the honorable the judges of the United States circuit court of appeals for the fifth circuit to

send without delay to the Supreme Court of the United States the record and proceedings in the case of Count Joseph Telfener, plaintiff in error, *vs.* George W. Russ, defendant in error, do hereby attach to said writ of certiorari a written agreement between counsel for said Telfener and said Russ, dated October 23rd, 1894, making such agreement my return to said writ.

Given under my hand and seal of office in the city of New Orleans this the 26 day of October, 1894.

JAMES M. McKEE,

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

Clerk of United States Circuit Court of Appeals for Fifth Circuit.

[Endorsed:] Supreme Court of the United States. No. 813. October term, 1894. Count Joseph Telfener, pl'ff in error *vs.* George W. Russ. Writ of certiorari.

67 In Supreme Court of the United States, October Term, 1894.

Count JOSEPH TELFENER, Petitioner,
vs.
GEORGE W. RUSS. } No. 813.

We, counsel for said Telfener and said Russ, do hereby agree that the certified copy of the transcript now on file with the petition in the above entitled and numbered cause, shall be taken as a return to the writ of certiorari issued in said cause on 19th day of October, 1894.

October 23rd, 1894.

J. L. PEELER,
Counsel for Count Joseph Telfener.
S. R. FISHER,
Counsel for George W. Russ.

68 [Endorsed:] No. 813. Count Joseph Telfener, petitioner, *vs.* George W. Russ. Agreement of counsel. Filed in United States circuit court of appeals for fifth circuit this 26 day of October, 1894. J. M. McKee, clerk.

69 [Endorsed:] Case No. 15697. Supreme Court U. S., October term, 1894. Term No., 813. Count Joseph Telfener, P. E., *vs.* Geo. W. Russ. Writ of certiorari & return. Filed Nov. 2, 1894.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 813

COUNT JOSEPH TELFENER, Petitioner,

vs.

GEORGE W. RUSS.

Certified copy of record from the United States Circuit Court of Appeals for the Fifth Circuit, in the cause of Count Joseph Telfener, Plaintiff in Error, vs. George W. Russ, Defendant in Error.

UNITED STATES OF AMERICA, FIFTH JUDICIAL DISTRICT.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals, for the Fifth Circuit, begun and held pursuant to law on the third Monday of November, A.D. 1893, in the court room of said court in the city of New Orleans, State of Louisiana, before the Honorable Don A. Pardee, United States Circuit Judge for the Fifth Judicial Circuit, and the Honorable Harry G. Toulmin, United States District Judge for the Southern District of Alabama.

COUNT JOSEPH TELFENER,
Plaintiff in Error,
vs.
GEORGE W. RUSS,
Defendant in Error,

Be it Remembered, That heretofore, to-wit: on the 28th of August, 1893, a transcript of the record of the above styled cause from the United States Circuit Court for the Western District of Texas, was filed in the office of the clerk of said United States Circuit Court of Appeals, in the words and figures following, to-wit:

COUNT JOSEPH TELFENER, Plaintiff in Error,

vs.

GEORGE W. RUSS, Defendant in Error.

INDEX.

	Original.	Print.
Caption	2	2

INDEX TO TRANSCRIPT OF RECORD.

Caption	3	3
Plaintiff's petition and exhibits M and N	3	3
Petition, bond, and judgment for removal	14	14
Defendant's amended answer	17	17
Court's charge, including special instructions given	19	19
Judgment	28	28
Defendant's bill of exceptions	30	30
Telfener's petition for writ of error	38	28
Telfener's assignment of errors	39	39
Cost bond on writ of error	42	42
Original writ of error	43	43
Citation in error	44	44
Clerk's certificate	44	44
Hearing and submission	46	45
Judgment	46	45
Petition for rehearing	48	46
Rehearing refused	53	49
Opinion	54	49
Certificate of clerk	63	53

1 *Caption.*

Be it Remembered. At a regular term of the United States Circuit Court begun and holden at Austin, within and for the western district of Texas, before the Honorable T. S. Maxey, and ending on the 18th day of July, A. D. 1893, the following case came on for trial and proceedings had therein, as follows, to-wit:

GEORGE W. RUSS, Plaintiff,
versus
Count J. TELFENER, Defendant. } No. 1[illegible]18.

PLAINTIFF'S ORIGINAL PETITION AND EXHIBITS M AND N.

STATE OF TEXAS,
County of Travis, Texas, } *ss:*

In Travis District Court. October Term, 1883.

GEORGE W. RUSS,
vs.
Count J. TELFENER. } Action for Breach of Contract.

2 To the District Court of the County of Travis and State of Texas:

George W. Russ, plaintiff, complaining of Joseph Telfener, defendant, represents, that plaintiff is a resident of the city of Dallas, county of Dallas, and State of Texas; that defendant is usually and better known as and represents himself to be Count J. Telfener, by which name he is hereby sued, and that defendant is not a resident or citizen of the State of Texas, but is a transient person and is now temporarily at, to-wit, the city of New York, in the State of New York.

That on the 1st day of November, 1882, plaintiff was the sole owner of a certain valuable, valid, and transferable interest in the whole of a certain body of land, containing, as subsequently ascertained by lawful survey, eighteen hundred and thirteen tracts of land of six hundred and forty acres each, being in the aggregate one million one hundred and sixty thousand three hundred and twenty acres, situated in the county of El Paso and State of Texas, and forming a part of what is known as the "Pacific reservation;" that plaintiff had become the owner of said interest in said eighteen hundred and thirteen tracts by complying with the requirements of the laws of the State of Texas, and particularly by

complying with the requirements of the act of the Legislature of the State of Texas entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, as amended by the appropriate act approved March 11, 1881, entitled "An act to amend sections one and six" of the above entitled act of July 14, 1879.

That plaintiff during the month of October, 1882, being a responsible
3 party and intending to purchase said body of land, which was lawfully subject to purchase and sale under the terms of said acts of July 14, 1879, and March 11, 1881, applied to the surveyor of the county of El Paso, State of Texas, in writing, for the purchase from the State of Texas and for the survey of said eighteen hundred and thirteen sections or tracts, describing the same by metes and bounds as a whole; that pursuant to the instructions of the Hon. W. C. Walsh, the Commissioner of the General Land Office of the State of Texas, to the surveyors of the counties and land districts containing the lands subject to sale under said acts, plaintiff made his application for purchase and survey of said lands to the surveyor of said county of El Paso, in writing, describing said lands by metes and bounds, courses and distances, which application was by said surveyor duly filed and recorded in the office of said surveyor during the month of October, 1882; that said application consisted of two different written instruments, each describing different portions of said lands.

That plaintiff having thus made due application for the purchase and survey of said lands, was, on the 1st day of November, 1882, about to proceed to have said lands surveyed into tracts of six hundred and forty acres each, when defendant, by his duly authorized agents, applied to plaintiff to purchase of plaintiff his interest in said lands, acquired as herein before stated; that plaintiff having not yet paid to the State of Texas the fifty cents per acre to which said State was entitled, and defendant offering to assume such payment to the State, and desiring simply to contract with plaintiff for the purchase and assignment of plaintiff's right to purchase from the State, they—i. e., the plaintiff in person and the defendant by his agent—at the city of Dallas, Texas, on the 1st day
of November, A. D. 1882, executed a written contract, evidenced
4 by two separate instruments, each of which is made a part of this petition by a copy attached hereto and marked Exhibits M and N; that by the terms of said contract, as evidenced by that instrument herein referred to as Exhibit M, it is recited that the plaintiff "claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue" of the act herein before described. Said instrument further recited that said application had been made in October, 1882, and duly filed in the surveyor's office of El Paso county, at Ysleta.

And plaintiff avers that the tract of land thus described as "about one million acres of land, more or less," was intended to describe the eighteen hundred and thirteen sections herein before mentioned, and that the application mentioned in said instrument as made and filed in October, 1882, is the same application herein before alleged as having been made and filed by the plaintiff.

That said instrument further recites that the defendant was desirous of "purchasing from said Russ," the plaintiff, "all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law," the said Act of July 14, 1879, as amended, "entitle said Russ," the plaintiff, "to become the purchaser of said lands from the State of Texas;" that said instrument thereupon recited that in case (such) said application had been duly made and filed, which plaintiff again avers had been done, the defendant "has agreed and promised to pay to the said Russ," the plaintiff, "as consider-
5 ation of his sale, transfer, and assignment of all his said rights, titles, and interests twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ," the plaintiff, "has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener," the defendant, "all his rights, titles, and interests in said lands acquired by his said application and files."

And plaintiff avers, that by the terms of this contract thus set out above literally, the plaintiff sold and agreed to assign to said defendant, and the defendant purchased and agreed to accept from the plaintiff, at and for the price of twenty-five cents per acre, a conveyance of plaintiff's said application for purchase from the State of Texas of said eighteen hundred and thirteen sections of land in El Paso county, Texas, forming part of said Pacific reservation.

And plaintiff further avers, that he was at the date of said contract able and duly authorized to make such contract of sale, and to execute and deliver to the defendant a proper and valid assignment and transfer of his said application and of all plaintiff's rights, titles, and interests thereunder.

The said contract, as evidenced by the instrument herein by copy designated as "Exhibit M," proceeded to recite, that "in order that said contract of purchase and sale and assignment may be effected, the said parties," the plaintiff and defendant, "agree as follows: The said Count Telfener," the defendant, "for the purpose of ascertaining whether the said application has been regularly and properly made as aforesaid, and according to the provisions of said law, and the amount of land covered by or embraced within such application, shall proceed at once and in-
6 spect the records and files of the surveyor's office of El Paso

county, at Ysleta, and the maps of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as, under the terms of said law, would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties," the plaintiff and defendant, "shall ascertain by reference to said application and files and the maps of said county in said surveyor's office and in the office of the Commissioner of the General Land Office of the State, at Austin, the number of acres approximately embraced in or covered by said application and files, the number of acres being ascertained by approximation in manner aforesaid; and said application having been found good and regular as aforesaid, the said Count Telfener," the defendant, "agrees to pay to said Russ in cash, in the city of Dallas or the city of Austin, Texas, as the said Russ," the plaintiff, "shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ," the plaintiff, "agrees and binds himself that, upon such payment being made, he shall execute and deliver to said Count Telfener," the defendant, "any and all deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count J. Telfener," the defendant, "all and singular the rights, titles, and interests that the said Russ," the plaintiff, "now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same or any part thereof by, through, or under him," the plaintiff. "It is understood, however,
7 that the said inspection, ascertainment of regularity of files, and the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Telfener," the defendant, "shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid."

And plaintiff alleges, that pursuant to and in performance of said terms of contract herein before immediately recited, the plaintiff in person and the defendant by his duly authorized agents, repaired to Ysleta, El Paso county, Texas, on the 3d day of November, 1882, and then and there inspected the records and files of the surveyor's office of El Paso county, Texas, and the maps of said county in said surveyor's office, and the application of plaintiff for purchase and survey of said Pacific reservation lands; and that as a result of said inspection defendant found, and plaintiff avers, that the said application and files had been regularly and properly made in such manner as under the terms of said laws of the State of Texas would entitle the plaintiff to become the purchaser of said lands from the State of Texas; and plaintiff further avers that upon said inspection at Ysleta, by reference to plaintiff's said application and files

and the maps of said El Paso county on file in said surveyor's office, and also on the 6th day of November, 1882, by an inspection of the maps of said El Paso county on file in the office of the Commissioner of the General Land Office of the State of Texas, at Austin, Texas, by approximation that the number of acres embraced under said contract as covered by said application which the plaintiff as such applicant and defendant as plaintiff's assignee under said contract would be entitled to purchase from the State of Texas under the laws thereof, would be one million one hundred and sixty thousand three hundred and twenty acres; and plaintiff

8 avers that the full purchase price of said land at said contract price of twenty-five cents per acre was two hundred and ninety thousand and eighty ($290,080) dollars, of which sum there became due and payable to the plaintiff from the defendant on the 15th day of November, 1882, under the terms of said contract, ninety per centum thereof, being two hundred and sixty-one thousand and seventy-two ($261,072) dollars.

And plaintiff further avers, that on and prior to the 15th day of November, 1882, the defendant, having full knowledge of said inspection and approximation, and knowing himself to be indebted to plaintiff in said sum, and having in his possession the duplicate of said contract (which had been executed in duplicate), was notified by plaintiff that he, the plaintiff, would be present at the city of Dallas, Texas, on the 15th day of November, A. D. 1882, for the purpose of receiving from the defendant said ninety per centum of said purchase price and for the execution to the defendant of any and all deeds or other instruments proper or necessary to convey, transfer, and assign to the defendant all and singular the rights, titles, and interests that the plaintiff had or was entitled to in and to said lands by reason of such application and files, and to bind himself by such conveyance, by covenant of warranty, against all persons claiming or to claim said land or any part thereof by, through, or under the plaintiff; and plaintiff further avers, that on said 15th day of November, 1882, he, plaintiff, was present at his office, in the said city of Dallas, Texas, during the whole of said day, for the purpose of receiving from the defendant said payment of ninety per centum and for the purpose of executing to said defendant a conveyance in every respect conforming to the

9 requirements of said contract, as herein before recited, but that the defendant, without any explanation of his absence and without any denial of his liability under said contract, and without in any manner asking delay or postponement, and without any request for modification, amendment, or recession [rescission] of said contract, and without notifying the plaintiff as to defendant's whereabouts, wholly failed to appear in the city of Dallas, Texas, and utterly and entirely failed, and has to this time utterly and entirely failed, to pay to this plaintiff any part of said pur-

chase price, and that defendant has never since the execution of said contract, either in person or by agent or attorney, offered to make said payment to the plaintiff or to accept from the plaintiff said conveyance of said lands.

And plaintiff further avers, that at no time since the execution of said contract up to this present time has there been any valid adverse claim to said lands which would have been a cloud upon or the basis of a controversy concerning plaintiff's title to said lands under said application; and plaintiff further avers, that ever since and on the 15th day of November, 1882, up to and at this moment, he, plaintiff, has been and is willing, upon receipt of said purchase price as provided in said contract, to execute to said defendant the conveyance contemplated and agreed upon by said contract, and of this fact the defendant and his agents have been repeatedly notified since and on said 15th day of November, 1882; and plaintiff further avers, that since the 15th day of November, 1882, prior to bringing this suit, the plaintiff repeatedly notified defendant that he, plaintiff, relying upon said contract, would endeavor to sell said lands to other parties for the benefit of both plaintiff and defendant, holding the latter liable for any loss that plaintiff might incur by reason of a sale for a less sum than that specified in plaintiff's said contract with defendant; and plaintiff further avers, that he, at great expense and outlay of time and money, endeavored constantly from and after November 15, 1882, to sell his right to said lands to other parties for the benefit of said plaintiff and defendant, but that he wholly failed to make any sale thereof whatever; that from and after said date he used his best efforts to dispose of his right, title, and interest in said lands at the best price obtainable, but was unable to dispose of same at any price whatever; that his said right was at any time from and after said date unsaleable at any price.

Plaintiff further alleges, that under the terms of said contract, as shown by "Exhibit M," it was therein recited and agreed that "after the transfer and assignment as aforesaid" (set out theretofore in said contract) "shall have been made by the said Russ," the plaintiff, "the said Count Telfener" the defendant, "shall proceed without delay and have said lands surveyed and platted, and the field notes thereof returned and filed according to the provisions of said law. Upon the completion [of] said surveys and field notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the sum so paid as aforesaid by said Count Telfener," the defendant, "shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid in cash at once to said Russ," the plaintiff, "by the said Count Telfener," the defendant, "in the city of Dallas, Texas, or in Austin, Texas, as the said Russ may prefer."

Plaintiff further alleges, that pursuant to the clause of said contract last above set out herein, providing for the survey of said lands, plaintiff and defendant, in the same manner as and at the same time that the
11 instrument herein set out as "Exhibit M" was executed, executed that part of said contract herein set out by the copy marked "Exhibit N," which recited that "whereas the said parties," the plaintiff and defendant, had "entered into a contract" (herein set out by said copy marked "Exhibit M") "providing for the sale and transfer by said Russ," the plaintiff, "to the said Count Telfener," the defendant, "of all the right, title, and interest of said Russ," the plaintiff, "in a certain tract of land of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ," the plaintiff, "has made application under and by virtue of the act of the Legislature of Texas, approved July 14, 1879, known as 'the fifty-cent act;' and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land and file the field notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the General Land Office at Austin within the time required by the said law. Now, therefore, it is agreed by the said Russ," the plaintiff, "that if the said sale and transfer shall be made under the said contract as aforesaid" ("Exhibit M") "he," the plaintiff, "will, at his own proper cost and expense, make all the surveys, field notes, and maps of the said lands and file them in the office of the surveyor of El Paso county and in the General Land Office of the State, at Austin, in the manner and within the time required by the provisions of the said law of July 14, 1879, amended by the Act of March 11, 1881, and that he," the plaintiff, "will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office for said lands to said Count Telfener," the defendant, "his heirs or assigns, the
12 said surveys, field notes, and maps to be correct; and in consideration of said services and payments to be rendered and paid by said Russ," the plaintiff, "the said Count Telfener," the defendant, "agrees and binds himself to pay to said Russ," the plaintiff, "in cash, at the city of Dallas or at Austin, Texas, the sum of five cents per acre for each and every acre so surveyed, platted, and returned by him," the plaintiff, "as aforesaid, said payment to be made as follows, viz., three cents per acre when the surveys and field notes shall be completed, one cent per acre when the field notes shall be filed in the Land Office, and the balance when the patent shall issue."

And plaintiff alleges that upon the execution of said instruments herein set out as "Exhibits M and N," constituting this contract for purchase and survey, he at once perfected arrangements for the surveying of said lands as agreed upon, and at the special instance and request of defendant,

through his lawfully authorized agent, began such survey before the 15 day of November, 1882; that on defendant's failure to make payment of said ninety per centum of the purchase price plaintiff notified defendant, through defendant's agents, that he, plaintiff, had already contracted with the county surveyor of El Paso County, Texas, for the survey of said lands, and that he, plaintiff, having already incurred a liability for the cost of such surveying, and having already expended large sums of money in making said survey, and that, therefore, he, the plaintiff, was willing at any time, at either the city of Austin or the city of Dallas, Texas, to receive said ninety per centum of the purchase money and execute such conveyance to defendant, and that he, plaintiff, would continue said survey until it was completed, holding himself ready and liable at any
13 time that defendant would perform his part of said contract to make to the defendant the conveyance called for by said contract.

Plaintiff further alleges, that with the view of protecting the rights of both plaintiff and defendant under said contract and to prevent said lands from being forfeited to the State of Texas by his, plaintiff's, failure to have them surveyed within the time required by law, he, the plaintiff, caused said survey to be completed according to law, and on the 8th day of January, 1883, he filed lawful and complete field notes of such survey, duly certified and executed by the surveyor of El Paso county, Texas, accompanied by proper and complete maps in the office of the Commissioner of the General Land Office of the State of Texas, at the city of Austin, Texas, where said field notes and maps were duly and officially filed, and where they yet remain as part of the records of that office. Plaintiff further avers, that said survey, field notes, and maps were and are correct. Plaintiff further avers, that said field notes were made in his name, not merely in compliance with law, but also to protect himself until defendant should make the payments due plaintiff under said contract, but not with a view of asserting claim to said lands adverse to defendant's rights under said contract upon defendant's performance of his agreements therein.

Plaintiff further alleges, that defendant having in his possession continuously from and after the 1st day of November, 1882, the duplicate of said contract, and being fully advised of plaintiff's actions, demands, and willingness to perform said contract, never notified plaintiff that he, defendant, intended to refuse to accept the benefits of said contract, but on the contrary, held himself out to capitalists as being the owner of said lands under said contract. Plaintiff further avers, that he performed, on his part, each and every act by him stipulated to be done, except
14 that he did not make said conveyance to defendant because of the latter's failure to perform any part of his agreements; that plaintiff has always been and still is willing and hereby offers to execute to the

defendant the conveyance mentioned in said contract and in all things to perform his part of said contract.

Plaintiff further avers, that in all things the defendant has failed to perform his part of said contract, especially in failing to pay to plaintiff said purchase price or any part thereof, in failing to pay to plaintiff the five cents per acre for surveying said lands and filing the field notes and maps of said survey, amounting to fifty-eight thousand and sixteen dollars, and in failing to pay to the State of Texas, as required by law, the fifty cents per acre entitling the purchaser to patents—all to plaintiff's damage in the sum of four hundred thousand dollars.

To pay said several sums of money or either of them the said defendant has wholly made default, although often requested to pay the same, both at said town of Dallas and at said town of Austin; wherefore plaintiff brings this suit and prays that the said defendant be duly and legally cited as a party defendant hereto, and that upon the final hearing hereof that he, the plaintiff, may have judgment for said sums of money of twenty-five cents per acre so due and owing him for said one million one hundred and sixty thousand three hundred and twenty acres, as also for said sum of fifty-eight thousand and sixteen dollars, so due him on said contract marked "Exhibit N" as aforesaid, together with legal rate of interest thereon since both of said sums of money became due and payable, and for such other and further order, judgment, and decree in the premises as on the hearing hereof may seem equitable and just, as well as all costs in this suit expended; and so petitioner will ever pray, etc.

15 HANCOCK & SHELLY,
Att'ys for Pl'ff.

Copy.

EXHIBIT M.

THE STATE OF TEXAS, }
County of Dallas. } *ss.*

This contract and agreement, entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows:

Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue of an act of the Legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso county, at Ysleta; and

whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the State of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every
16 acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his said application and files. In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly and properly made as aforesaid and according to the provisions of said law, and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said surveyor's office and in the office of the Commissioner of the General Land Office of the State at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation, in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds
17 himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, titles, and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same, or any part thereof, by, through, or under him. It is understood, however, that the said inspection, ascertainment of regularity of files, and of

the amount of land by approximation, shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

After the transfer and assignment as aforesaid shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted and the field notes thereof returned and filed according to the provisions of said law.

Upon the completion of said surveys and field notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

18 Witness our hands this 1st day of November, 1882.

GEO. W. RUSS,
J. TELFENER,
By C. BACCARISSE, *Ag't.*

Witness:
CHAS. FRED. TUCKER.
WM. McGRAIN.

EXHIBIT N.

This contract and agreement, entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows:

Whereas, the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the Legislature of Texas approved July 14, 1879, known as the 50-cent act; and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land and file the field notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the General Land Office at Austin within the time required by the said law. Now, therefore, it is agreed by the said Russ that if the sale and transfer shall be made under the said contract as aforesaid he will, at his own proper cost and

19 expense, make all the surveys, field notes, and maps of the said lands and file them in the office of the surveyor of El Paso county and in the General Land Office of the State at Austin, in the manner and

within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field notes, and maps to be correct, and in consideration of said services and payments to be rendered and paid by said Russ, the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz.: Three (3) cents per acre when the survey and field notes shall be completed, and one (1) cent per acre when the field notes shall be filed in the Land Office, and the balance when the patents shall issue.

Witness our hands this 1st day of November, 1882.

(Signed) GEO. W. RUSS,
J. TELFENER,
By C. BACCARISSE, *Ag't.*

Endorsement: 6038. Geo. W. Russ *vs.* Count J. Telfener. Original petition. Filed June 16, 1883. Jas. P. Hart, clerk.

20 *Petition, Bond, and Judgment for Removal.*

In the District Court of Travis County, State of Texas.

GEORGE W. RUSS, Plaintiff,
vs.
Count J. TELFENER, Defendant. } No. 6038.

Petition for Removal to the Circuit Court of the United States for the Western District of Texas, at Austin.

To said district court:

Your petitioner respectfully shows to said honorable court that the matter and amount in dispute in above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars. That the controversy in said suit is between a citizen of the State of Texas, of the United States, and a citizen and subject of a foreign state, and that petitioner was at the time of the commencement of this suit and still is a citizen and subject of the Kingdom of Italy, and that said George W. Russ was at the time of the commencement of this suit and still is a citizen of the State of Texas; and your petitioner offers herewith a bond, with good and sufficient security, for his entering in said Circuit Court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein

except to make the order of removal required by law and to accept the surety and bond and to cause the record herein to be removed
21 into the said Circuit Court of the United States in and for the said Western District of Texas, at Austin; and he will ever pray, etc.

J. TELFENER,
By GLASS & CALLENDER and
A. J. PEELER, *His Attorneys.*

(Endorsed:) 6038. Filed October 1, 1883. Jas. P. Hart, Clerk.

STATE OF TEXAS, }
Travis County. }

Before the undersigned authority personally came C. K. Westcott, who, being duly sworn, deposes and says that he is and has been for two years last past personally acquainted with Count J. Telfener, the petitioner named in above petition, and that said Telfener was and is, as he is represented to be in said petition, a citizen and subject of a foreign state, to-wit, of the Kingdom of Italy.

C. K. WESTCOTT.

Sworn to and subscribed before me this 24th day of September, A. D. 1883.

In testimony I hereto set my hand and seal of office.

[L. S.] R. C. SHELLEY,
Notary Public, Travis County, Texas.

(Endorsed:) 6038. Filed October 1, 1883. Jas. P. Hart, Clerk.

Know all men by these presents, that we, J. Telfener, as principal, and ————, as sureties, are held and firmly bound unto George W. Russ in the penal sum of five hundred ($500.00) dollars, for the payment whereof, well and truly to be made unto the said George W. Russ,
22 his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said J. Telfener having petitioned the district court of Travis county, State of Texas, for the removal of a certain cause therein pending, wherein the said George W. Russ is plaintiff and the said J. Telfener is defendant, to the Circuit Court of the United States in and for the western district of the State of Texas, at Austin; now if the said J. Telfener, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do or cause to be done such other and appropriate acts as may be required of him in the matter of the removal aforesaid, then

this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this the 1st day of October, 1883.

J. TELFENER,
By GLASS & CALLENDER and
A. J. PEELER, *His Attorneys.*
FRANK HAMILTON,
JOHN J. TOBIN, *Sureties.*

Approved:
JAS. P. HART,
Clerk Dist. C't Travis County, Texas.

Accepted & Approved.
Oct. 15, 1883.

A. J. WALKER,
Judge 16th Dist., &c.

(Endorsed:) 6038. Filed Oct. 1st, 1883. Jas. P. Hart, clerk.

23 GEO. W. RUSS *vs.* COUNT J. TELFENER. } No. 6038.

And now, on this the 15th day of October, 1883, the defendant, by his attorney, having presented his petition and bond for the removal of this cause to the United States Circuit Court, having submitted the same to the court, on the 5th day of October, 1883, and said petition and bond, appearing regular, are received and the bond approved:

It is now, therefore, ordered by the court that further proceedings in this cause be suspended.

Bill of Costs.

GEO. W. RUSS *vs.* COUNT J. TELFENER. } No. 6038.

Clerk's fees:

Dock. suit	20	Clerk's costs for'd	$55.20
Issuing notice and dup	1.50		
" citation and dup	75	Sheriff's fees:	
En. copy pet. and cert	26.85	Serv. cit. Fenner, sh'ff Victoria Co.	1.50
Entering appearance	15		
" order	75		$56.70
Taking 1 bond	1.50	Comm'r fee N. Y.	1.00
Filing 10 papers	1.50		
Ent. judgt. of suspension	75		$57.70
Tax cost	25	By error order	75
Transcript	21.00		
	$55.20		$56.95

THE STATE OF TEXAS, }
County of Travis. }

I, James P. Hart, clerk of the District Court of Travis county, Texas, do hereby certify that the foregoing on —— pages is a just, true,
24 and correct copy of all the proceedings had and pleadings filed in the case No. 6038 of George W. Russ vs. Count J. Telfener, as appears from the record and on file in my office.

Witness my hand and the seal of said court, at office in Austin, this 16th day of October, A. D. 1883.

JAS. P. HART,
[SEAL] *Clerk D. C. T. C., Texas.*
By W. H. SHELLEY, Dep'ty.

(Endorsed:) No. 1918. Count J. Telfener *vs.* Geo. W. Russ. Transcript. Filed Oct. 26, 1883. M. Hopkins, cl'k, By Sam. Hopkins, dep'ty cl'k.

Defendant's Amended Answer.

In United States Circuit Court at Austin, Texas.

GEORGE W. RUSS, }
vs.
Count J. TELFENER. }

And now comes the defendant, leave of court being first obtained, and files this his first amended original answer to plaintiff's original petition, and for answer says:

1. Said petition is insufficient in law to require him to answer thereto; wherefore, etc.

2. Defendant specially excepts to said petition as follows: To so much and to such portions and allegations of said petition as seek a recovery of damages for anything done by plaintiff or any expense incurred
25 by plaintiff in carrying out or attempting to carry out by plaintiff any of the terms or provisions of the contracts in said petition mentioned after the 15th day of November, 1882.

3. Said defendant denies all and singular the allegations contained in plaintiff's petition; and of this he puts himself upon the country and prays judgment of the court.

4. Further answering, defendant says, that if said Bacarisse ever had any authority to negotiate in regard to the purchase of land in Texas it was merely as an employe under one C. K. Westcott, and said Bacarisse was merely employed to enquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands subject to the inspection and approval of the lands by an expert or

this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this the 1st day of October, 1883.

J. TELFENER,
By GLASS & CALLENDER and
A. J. PEELER, *His Attorneys.*
FRANK HAMILTON,
JOHN J. TOBIN, *Sureties.*

Approved:
JAS. P. HART,
Clerk Dist. C't Travis County, Texas.

Accepted & Approved.
Oct. 15, 1883.

A. J. WALKER,
Judge 16th Dist., &c.

(Endorsed:) 6038. Filed Oct. 1st, 1883. Jas. P. Hart, clerk.

23 GEO. W. RUSS *vs.* COUNT J. TELFENER. } No. 6038.

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It is now, therefore, ordered by the court that further proceedings in this cause be suspended.

Bill of Costs.

GEO. W. RUSS *vs.* COUNT J. TELFENER. } No. 6038.

Clerk's fees:

Dock. suit	20	Clerk's costs for'd	$55.20
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Entering appearance	15		$56.70
" order	75	Comm'r fee N. Y.	1.00
Taking 1 bond	1.50		$57.70
Filing 10 papers	1.50	By error order	75
Ent. judgt. of suspension	75		$56.95
Tax cost	25		
Transcript	21.00		
	$55.20		

THE STATE OF TEXAS, }
County of Travis. }

I, James P. Hart, clerk of the District Court of Travis county, Texas, do hereby certify that the foregoing on —— pages is a just, true,
24 and correct copy of all the proceedings had and pleadings filed in the case No. 6038 of George W. Russ vs. Count J. Telfener, as appears from the record and on file in my office.

Witness my hand and the seal of said court, at office in Austin, this 16th day of October, A. D. 1883.

JAS. P. HART,
[SEAL] *Clerk D. C. T. C., Texas.*
By W. H. SHELLEY, Dep'ty.

(Endorsed:) No. 1918. Count J. Telfener *vs.* Geo. W. Russ. Transcript. Filed Oct. 26, 1883. M. Hopkins, cl'k, By Sam. Hopkins, dep'ty cl'k.

Defendant's Amended Answer.

In United States Circuit Court at Austin, Texas.

GEORGE W. RUSS, }
vs.
COUNT J. TELFENER. }

And now comes the defendant, leave of court being first obtained, and files this his first amended original answer to plaintiff's original petition, and for answer says:

1. Said petition is insufficient in law to require him to answer thereto; wherefore, etc.

2. Defendant specially excepts to said petition as follows: To so much and to such portions and allegations of said petition as seek a recovery of damages for anything done by plaintiff or any expense incurred
25 by plaintiff in carrying out or attempting to carry out by plaintiff any of the terms or provisions of the contracts in said petition mentioned after the 15th day of November, 1882.

3. Said defendant denies all and singular the allegations contained in plaintiff's petition; and of this he puts himself upon the country and prays judgment of the court.

4. Further answering, defendant says, that if said Bacarisse ever had any authority to negotiate in regard to the purchase of land in Texas it was merely as an employe under one C. K. Westcott, and said Bacarisse was merely employed to enquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands subject to the inspection and approval of the lands by an expert or

inspector sent out by a London syndicate to make such inspection and report, no such contract to be final and binding unless ratified by this defendant after such expert had reported his approval of the land, but neither Westcott nor any other person had authority to execute such contracts as are set up in plaintiff's petition. This defendant never knew till shortly before this suit was instituted that said Bacarisse had attempted to execute any such contracts as are set up in plaintiff's petition, and if he ever heard that any contract had been made with plaintiff for lands he supposed it was a contract subject to his own ratification after the report of said expert, and if he ever proposed to sell any of said lands to said syndicate or other capitalists it was done upon the supposition that he had a contract for the purchase subject to his ratification and which he expected to ratify if the expert aforesaid should report favorably upon the lands; but defendant says said expert reported unfavorably
26 upon plaintiff's lands, and this defendant never ratified the alleged contracts made by Bacarisse.

5. And, further answering, the defendant saith on oath that the contracts mentioned in plaintiff's petition and made exhibits thereof were not executed by this defendant nor by his authority, and that C. Baccarisse, by whom as agent for this defendant said contracts purport to have been executed, was not authorized by this defendant to execute said contracts, or either of them.

6. This defendant further says that the eighteen hundred and thirteen sections of land mentioned in plaintiff's petition, were never actually surveyed on the ground, but the field notes to same were made by and in the office of A. M. Randolph, county surveyor of El Paso county, Texas, and were and are now void and under which plaintiff can claim no right whatever.

Joseph Telfener, defendant above named, being duly sworn, saith on oath that the statements of the foregoing answer purporting to be made on oath are true.

J. TELFENER.

Sworn to and subscribed by said Joseph Telfener before me, vice consul general of the United States of America, at Paris, France, this fifteenth day of September, A. D. 1883. Witness my hand and seal of office.

[SEAL] ROB'T M. HOOPER,
Vice-Consul General, Paris.

GLASS & CALLENDER &
A. J. PEELER, *For Def't.*

Endorsed in the following words, to-wit:

1918. Russ *vs.* Telfener. Defendant's 1st am. original ans. to pl'ff's orig. petition. Filed Feb'ry 2nd, '86. Sam. Hopkins, clerk.

27 *Charge of the Court, Including Special Instructions Given.*

GEORGE W. RUSS
vs. 1918.
JOSEPH TELFENER. } United States Circuit Court of the Western District of Texas, Austin Division.

Gentlemen of the Jury:

Plaintiff brings his suit to recover damages because of alleged breach of contract on part of defendant. In his pleadings the plaintiff sets up two contracts, which he claims were executed by the defendant. The first is known as Exhibit "M" and the second as Exhibit "N." Both were executed on the same day, to-wit, the first day of November, 1882, and both were signed by the same parties. The plaintiff signs his own name in person, and the name of defendant is signed as follows: "J. Telfener, by C. Baccarisse, Agent."

The defendant denies that he executed the contracts in person, and further denies that Baccarisse had authority to execute them in his behalf, and hence he claims that they are not binding upon him.

The first question, therefore, presented for your consideration is, whether the contracts, particularly the one known as Exhibit "M," were executed in such manner as to be valid and binding upon the de-

28 fendant.

No formal power of attorney executed by the defendant has been introduced in evidence expressly conferring authority upon Baccarisse to execute the contracts in question. You must, therefore, look to all the facts and circumstances in evidence, apart from the declarations of those professing to act as agents, to determine whether Baccarisse was duly authorized to execute the contracts declared upon. If, from consideration of the evidence, you conclude that Baccarisse had authority direct from the defendant to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from, and knowledge and consent of, defendant, empowered Baccarisse to execute it. But if Baccarisse was neither empowered directly by the defendant, nor by Westcott, with authority from and knowledge and consent of defendant, to execute the contract, then it would not be binding upon the defendant, unless he ratified the same as hereinafter stated. If Baccarisse had no authority from defendant or Westcott, as above stated, to execute the contract, then it would not be binding upon the defendant, unless he, having a full knowledge of the terms of the agreement and the material facts and circumstances attending its execution, acquiesced in and recognized the same as his contract, in which event he would be held to have ratified it and it would be binding upon him.

To make it binding upon him in such case, you observe, he must have ratified the contract with full knowledge of its terms and of the material

facts and circumstances attending its execution. If he did so ratify it, then it would be binding upon him as though he had given authority to make the contract before the same was executed.

29 It is a familiar maxim that ratification has a retroactive efficacy and relates back to the inception of the transaction, and, when deliberately made with a knowledge of the circumstances, as before stated, can not be revoked or recalled.

If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the Legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant can not avoid liability thus created, notwithstanding he might have given private instructions to Baccarisse not to purchase without referring the matter to him for his ratification, provided, that such instructions were not communicated to and known by the plaintiff. If, however, the plaintiff knew that Baccarisse was instructed not to close any trade without first referring the matter to the defendant, then the plaintiff could not enforce a contract so made with Baccarisse without complying with such restrictions upon his authority.

To illustrate, and in the illustration I quote the language of my predecessor in charging the jury upon a former occasion:

"Suppose I send out agents to procure lands for me by purchase or otherwise. I give my agents certain specific directions to govern them, and then say to them, you must, before closing the trade, submit the trade to me for my approval; my agents go out and contract with persons and do close a trade, but without referring the same to me before closing. The agent having pursued the ordinary mode for procuring lands, and the person with whom he deals not being advised of the

30 restrictions by me placed upon my agent, but deals with him in good faith, and upon that faith changes his relation to the property, I am bound, because the agent acted within the general scope of his authority," and because the third persons are not affected by private instructions given to the agent which are not made known to them.

"This is, of course, to be taken with the qualification that if the person dealing with the agent knew of the instruction which was a limitation upon his right to act, and made a contract in violation of that instruction, he can not enforce it against me."

The defendant having denied under oath the execution of the contract by duly authorized agent, the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the contract was executed in such manner as to be binding upon the defendant.

If, upon a consideration of all the facts and circumstances in evidence, taken in connection with the foregoing charge, you reach the conclusion that the contract is not binding upon the defendant, then you will proceed no further except simply to return a verdict in his favor. If, however, your finding upon that issue be in favor of the plaintiff, you will then proceed to the consideration of other issues involved in the cause.

Plaintiff's applications for the purchase of the lands involved in this controversy were filed respectively on the 4th and 5th days of October, 1882. On the 1st day of November, following, as already stated, the contract designated "M" was executed.

This contract recites that plaintiff had, in due form, made application for the purchase of about one million acres of land, more or less, in El Paso county, in accordance with an act of the Legislature of Texas, approved July 14, 1879; that defendant was desirous of purchasing from plaintiff all his rights, titles, and interest under and by reason of such application, provided it should appear that such application had
31 been regularly made and filed in such manner as would, under the terms of said law, entitle plaintiff to become the purchaser of said lands from the State of Texas; and in such case, defendant agreed and promised to pay plaintiff, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application and file, and plaintiff agreed and bound himself, in consideration of such price and sum to be paid to him, to sell, transfer, and assign unto the defendant all his rights, titles, and interest in said lands acquired by said application and file.

In short, it was provided that if, upon examination, it should be found that by going forward under the law the party could secure the land, then defendant was to pay said amount to plaintiff for the rights which he had acquired under his application to purchase, and plaintiff was to convey such right, title and interest to the defendant. At the date of the contract it was not definitely known just how many acres were embraced in the applications, and the contract provides for the payment of 90 per cent of the estimated quantity, and this payment was to be made on or before the 15th day of November, 1882. It was further provided therein that, upon the completion of the surveys and field notes, the number of acres embraced in said lands so sold and transferred by the plaintiff to the defendant should be ascertained, and if the said 90 per centum to be paid by the defendant should not amount to the full purchase price of twenty-five cents per acre, then the deficit should be paid at once in cash by the defendant to the plaintiff in the city of Dallas or Austin, as the plaintiff might prefer.

Under the contract known as Exhibit "N" the plaintiff, for the con-

siderations therein named, agreed to have the lands surveyed and
32 field notes returned, &c., as required by law.

In reference to this contract, known as Exhibt "N," the plaintiff can not recover of defendant any damages because of a breach, or supposed breach, thereof, and you are instructed accordingly. You may, however, look to that contract, in connection with the evidence, to determine the exact number of surveys of land which are embraced in plaintiff's two applications. On this point, the evidence from the Land Office clearly shows that 1813 surveys of 640 acres each were made under plaintiff's two applications, and you are so instructed. Of the 1813 surveys, plaintiff claims nothing as to twenty-five thereof, which must be deducted, leaving involved in the controversy 1788 surveys of 640 acres each, or, 1,144,320 acres.

The Legislature of this State passed the act before referred to, of the 14th of July, 1879, by which it put upon the market lands which had been reserved from location and sale by what was known as the Pacific reservation. This reservation embraced lands in El Paso County, which were covered by the plaintiff's applications and surveys. The sections of said act which bear upon the questions in hand, are the following:

"Sec. 2. That any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said
33 application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

"Sec. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act all legal surveyor's fees for work done by them.

"Sec. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for."

The two applications of plaintiff for the purchase of the land, filed in the surveyor's office of El Paso county, as before stated, are a sufficient compliance with the law of 1879 to constitute them valid applications. They were regularly made and filed in such manner as, under the terms of said law, would have entitled plaintiff to become the purchaser from the State of Texas of the lands embraced therein had other provisions of the law been complied with in reference to making surveys, returning field notes, etc., paying patent and other fees and the fifty cents per acre required by the act.

The certificate of the Commissioner of the General Land Office shows that on the 8th day of January, 1883, plaintiff filed in the Land
34 Office the field notes of 1813 surveys of 640 acres each, and it is further shown that a map of said surveys was duly filed in the General Land Office. The certificate of the Commissioner further shows that the surveys made for plaintiff were made beginning on the 20th day of October, 1882, and ending on the 9th day of November, 1882. It further appears from said certificate that all of said surveys were made on and prior to November 1, except blocks "G," "H," "I," and "J," embracing in the aggregate ninety-eight sections, which were surveyed after November 1, but prior to the 15th day of November, 1882; hence it follows that all the lands were surveyed prior to the 15th day of November, the date provided in the contract for the payment of the 90 per cent by defendant and the execution of transfers by plaintiff.

Gentlemen, you observe from reading the law, that the surveyor was required to make the surveys upon application by responsible parties. The question of the responsibility of the plaintiff, when he applied to have the surveys made, was one to be determined by the surveyor who surveyed the lands, and the presumption would be conclusive, in the absence of testimony to the contrary, that the plaintiff was such responsible person. You are further instructed, that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could be lawfully assigned.

If, under the foregoing charge and the evidence in the case, you conclude that the contracts were executed in such manner as to be binding upon the defendant, then you will determine, from all the facts and circumstances in evidence, whether the plaintiff has in good faith performed all things required of him by said contract marked Exhibit "M," and whether he stood ready on the 15th day of November, 1882, to
35 execute transfers to defendant of his right, title and interest in and to said 1788 surveys embraced in his two applications. You will further look to the evidence to determine whether the defendant has performed his part of said contract, marked Exhibit "M," as by its

terms prescribed, and has, in accordance therewith, paid to the plaintiff the amount of money which he thereby agreed to pay.

If, upon consideration of the testimony, you find that plaintiff has in good faith performed his part of said contract marked Exhibit "M," and that the defendant has failed to comply with his part thereof, by declining to pay plaintiff as provided therein, then it would be your duty to return a verdict in favor of the plaintiff for such amount of actual damages as you find from the testimony he has sustained by reason of the breach of said contract on the part of the defendant.

As before stated, there remain for your consideration only 1788 surveys of 640 acres each, containing in the aggregate 1,144,320 acres of land. The plaintiff claims that he is entitled to damages at the rate of twenty-five cents per acre on said 1,144,320 acres, as, he contends, that defendant agreed to pay him twenty-five cents per acre for his right, title, and interest to the lands embraced within his applications.

Upon this point, it was said by the Supreme Court when this case was recently before it, that: "On the 15th of November he ('the plaintiff') possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

Further on, the court uses this language: "The measure of
36 damages must be the difference between the contract price and the salable value of the right when payment was to be made."

If anything could have been obtained from the sale of that right, if you hold that the contract was binding upon the defendant, it was the duty of the plaintiff to make the sale when the defendant defaulted in his contract, and thus to have subjected him to as little loss as practicable.

You will, therefore, look to all the evidence in the case to determine the salable value of the plaintiff's right on the 15th of November, 1882. If you conclude, from the consideration of all the facts and circumstances in evidence, that at said date said right had no salable value—in other words, that it was completely and absolutely worthless—then the measure of damages would be twenty-five cents per acre on the 1,144,320 acres. If, however, you find from the testimony that such right did have, on said 15th of November, 1882, a salable value, then you will determine what that salable value was, and the measure of damages would be the difference between the contract price and the salable value of the right at that date.

If you find a verdict in favor of the plaintiff for any amount of damages, you will award him interest thereon at the rate of eight per cent

per annum from said 15th day of November, 1882, to the present time. If, under the evidence and the foregoing charge, your finding be in favor of the plaintiff, you will return a verdict in the following form:

"We the jury find for the plaintiff, and assess his damages as follows:

"1. Principal amount, ———.

"2. Interest at the rate of 8 per cent per annum from Novem-

37 ber 15, 1882, to the present time, ———.

"Total amount of damages, ———."

You, gentlemen, to fill up the blanks with the amount of damages and interest found and have the verdict signed by your foreman.

If, however, your verdict be in favor of the defendant, you will simply say:

"We, the jury, find for the defendant."

You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony, and you are authorized to predicate your finding upon a preponderance of the evidence.

The case, gentlemen of the jury, is now in your hands; you will take it and render such a verdict as may be just and right in view of the evidence and the instructions of the court.

T. S. MAXEY, *Judge.*

(Endorsed): No. 1918. Geo. W. Russ v. Joseph Telfener. Charge of the Court. Filed July 11th, 1893. D. H. Hart, Clerk.

38 GEO. W. BUSS,
vs.
COUNT JOSEPH TELFENER.

Charge asked by plaintiff.

Plaintiff requests the court to give the following charge, in addition to the general charge given:

By salable value of plaintiff's right to the lands filed on by him it is meant the amount which by the use of reasonable efforts plaintiff could have sold said right for on the 15th day of November, 1882.

FISET & MILLER, *Attys. for Plaintiff.*

Given.

T. S. MAXEY, *Judge.*

Charge 1 asked by defendant.

GEORGE W. RUSS
vs. No. 1918.
COUNT JOSEPH TELFENER. } Special charge No. 1.

Defendant asks the court to charge the jury as follows:

Letters and telegrams between two persons both claiming to be agents of the same person, or between such agents and third parties, are not evi-

dence of the existence of the agency, or of the extent of the authority conferred, unless the principal had knowledge of and assented to such communications.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

39 Charge 2 asked by defendant.

GEORGE W. RUSS
vs. No. 1918. } Special Charge No. 2.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows:

The jury are instructed that when the act of ratifying the act of the agent is claimed to be implied from a knowledge of the facts by the principal, it must appear by a preponderance of the evidence, that the principal had full knowledge of all the facts affecting his interest in the transaction, and the jury are not to indulge presumptions against the defendant unless such presumptions are compatible with the facts in the case.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

Charge 3 asked by defendant.

GEORGE W. RUSS
vs. No. 1918. } Special Charge No. 3.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows:

The jury are instructed, as a matter of law, that upon the issue raised by defendant's plea of "non est factum," by which he denies under oath the authority of C. Baccarisse to execute for him the contracts of November first, 1882, the burden of proof is on the plaintiff to prove that authority, and he must prove his case as to this issue by a preponderance of evidence.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

40 Charge 4 asked by defendant.

GEORGE W. RUSS
vs. No. 1918. } Special Charge No. 4.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows: If the jury find from the evidence that the defendant did not in fact authorize West-

cott or Baccarisse to make absolute contracts for the purchase of lands or files upon lands, but that their authority as conferred by the defendant, and as understood by them, was only an authority to file on State lands or to make with private parties conditional contracts subject to the defendant's approval and ratification upon the receipt of an expert's report as to the character or quality of the land, and if the jury further find that the defendant in his correspondence with his agents had used expressions which, if taken alone, might seem to imply that those agents had a general authority to purchase lands for the defendant, the jury can not on the account of such expressions hold the defendant bound by the contract sued on unless the jury further find that letters or telegrams containing such expressions were shown to the plaintiff at or before the making of the contract sued on, and that he was thereby induced to believe that Baccarisse had authority to make said contract.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

41 Charge 5 asked by defendant.

GEORGE W. RUSS
vs. No. 1918. } Special Charge No 5.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows:

No words or acts of the defendant can be considered a ratification of the contract sued on or a recognition of it as binding upon him, unless such words or acts were said or done after the defendant had full knowledge of the nature and terms of the contract.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

Charge 12 asked by defendant.

GEORGE W. RUSS
vs. No. 1918. } Special Charge No. 12.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows:

The jury are instructed that the burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal to show by a preponderance of evidence that the agency did exist, and that the agent had the authority he assumes to exercise; agency can not be established by the oral declarations of an agent, nor by any act of his done without the authority or knowledge of his principal.

J. L. PEELER, *Attorney for Defendant.*

Given.

T. S. MAXEY, *Judge.*

42 The above charge is given with this explanation:

It is true that the fact of agency can not be established by the declarations of the agent. And you will therefore disregard the mere declarations of witnesses, professing to act as agents, on that point, and look to the telegrams, letters, and all other evidence in the case to determine whether Baccarisse was the authorized agent of the defendant in making the contracts. If you find that he was the agent of defendant, duly authorized to make the contracts, then acts done by him during the course of his employment and within the scope of his authority, would be binding upon the defendant.

T. S. MAXEY, *Judge.*

Judgment.

In United States Circuit Court, Western District of Texas, at Austin, July Term, 1893.

GEORGE W. RUSS
vs.
Count J. TELFENER. } No. 1918.

Be it remembered that on this, the 6th day of July, 1893, the above styled and numbered cause, to-wit: the cause of Geo. W. Russ *vs.* Count J. Telfener, numbered 1918 on the law docket of this court, was duly called for trial, whereupon the plaintiff appeared by his attorneys, Hancock and Shelley and Franz Fiset and C. H. Miller, and the defendant appeared by his attorney, J. L. Peeler, and thereupon both parties to-wit:

43 the plaintiff and the defendant, by their said attorneys, announced ready for trial, and thereupon a jury of twelve good and lawful men, residents and citizens of the Western District of Texas, were called to-wit: A. B. Dailey, foreman, and eleven others, who, after having been tried and empanneled, were sworn according to law, well and truly to try and determine the issues joined between said parties, plaintiff and defendant, and true verdict to render on the facts according to the law; thereupon the pleadings of the parties were read to the court and the jury, and the trial of said cause proceeded in the hearing of the court and said jury on the evidence offered by the parties to said cause until the 11th day of July, 1893, and on said 11th day of July, 1893, the cause was argued by counsel of plaintiff and defendant respectively; and thereupon the jury, having heard the pleadings, evidence, and argument of the parties to said cause, and having received the instructions or charge of the court on the law applicable to said case, on said 11th day of July, retired to consider of their verdict, and having so considered of their verdict, afterwards, to-wit: on the same day, the 11th day of July, 1893, returned into open court the following verdict, to-wit:

We, the jury, find for the plaintiff, and assess his damages as follows:

1st.	Principal amount.....	$286,080 00
2.	Interest at the rate of 8 per cent per annum from November 15, 1882, to present time, July 11, 1893...	243,867 22
	Total amount of damages.....	$529,947 22

A. B. DAILEY, *Foreman.*

And said verdict was thereupon accepted by the court and filed
44 by the clerk of said court. And thereupon, on the 12th day of July, 1893, came the plaintiff in this cause by his attorneys, and in open court stated that that part of the verdict of the jury returned in this cause on the 11th day of July, 1893, which awards interest to the plaintiff in the sum of $243,867.22 is excessive to the extent of $11,506.72, because on said principal sum of damages found by said jury, to-wit, the sum of $286,080, the plaintiff is only entitled to and claims interest at the rate of eight per cent per annum from the 15th day of November, 1882, to the 12th day of July, 1891, and from said date he only claims and is entitled to interest at the rate of six per cent per annum up to the rendition of the said verdict, to-wit, the 11th day of July, 1893; the total interest to which plaintiff is thus entitled and which he claims is $232,360.50. And the plaintiff therefore enters in open court a remitter on that part of the verdict stating the interest due plaintiff to the extent of $11,506.72, thus claiming under said verdict only, first, the full amount of the principal damages, to-wit, $286,080, and interest on said sum up to the date of the rendition of the said judgment in the sum of $232,360.50, or total of principal and interest of $518,440.50, and plaintiff prays that judgment be entered up for the full amount of the verdict of the jury less said remitter of $11,506.72, to-wit, in the sum of $518,440.50; which said remitter was thereupon allowed by the court and entered of record.

It is therefore considered, ordered and adjudged by the court that the plaintiff, George W. Russ, do have and recover of and from the defendant, Count J. Telfener, the sum of five hundred and eighteen
45 thousand four hundred and forty dollars and fifty cents ($518,440.50), (this being the amount assessed by the jury as aforesaid, after deducting from the interest amount of said verdict the sum remitted by the plaintiff as aforesaid), with interest thereon from this the 12th day of July, 1893, at the rate of 6 per cent per annum, together with all csost in this behalf expended; for all which let execution issue, etc.

Defendant's Bills of Exceptions.

Exception No. 1.

GEORGE W. RUSS *vs.* Count JOSEPH TELFENER. No. 1. } Defendant's Bill of Exceptions No. 1.

Be it remembered, that during the progress of this cause, the hereinafter ruling and action of the court was at the time the same was made, taken and announced excepted to in open court by the defendant in above entitled cause, to-wit:

The plaintiff was permitted to offer in evidence and read to the jury, over defendant's objection, the following telegrams from C. K. Westcott to C. Baccarisse, and which referred to the lands described in plaintiff's petition, viz.:

1. Oct. 25th, 1882.

To Chas. Baccarisse:

Provided there is at least one million close at eighty, General 46 [meaning the plaintiff] to undertake surveys and perfect things for issuance patent funds for commencing surveys shall be deposited immediately. Expert's favorable report and certified papers reach count [meaning the defendant], say within time specified by you, commission to be paid on certificate from land office that field notes are returned and patent will issue in Bosse's name [meaning defendant], he will pay State direct. Sign contract to mail or express certified copy file and map in duplicate. This will save much time and enable inspection probably in six days. Look up Presidio and Pecos affairs, mailing certified papers and maps. Wire before you leave.

C. K. WESTCOTT.

2. Oct. 27th, 1882.

To C. Baccarisse, San Antonio:

Yours twenty-fifth was answered immediately. Why did you not wait after asking a reply, knowing the thing to be so important? Go back and close at eighty as instructed.

C. WESTCOTT.

3. Oct. 28, 1882.

To C. Baccarisse, S. A.:

You never got my message of twenty-fifth because you did not wait for it. If you have received recent orders from Count [meaning the defendant] not to close at eighty, wire me; if not, close at eighty. General [meaning the plaintiff] to undertake surveys and make everything straight for issuance of patents. Funds for commencing surveys shall be deposited immediately after expert's favorable report reaches Count

[meaning the defendant], say within time specified by you. Com-
47 mission paid on receipt of certificate from land office, the field notes are got, and patents will be issued, Count [meaning the defendant] will pay State direct. Sign contract and mail or express certified copy of file and map. This will save much time and enable to have land inspected probably within five or six days.

C. K. WESTCOTT.

4. Nov'r 1, 1882.

To C. Baccarisse:

Accept General's [meaning the plaintiff] offer at twenty-five cents for transfer his file, same to be made as suggested by him after verifying correctness of same with county surveyor and Land Office records. Send immediately certified copies of file, map and contract.

C. K. WESTCOTT.

And to the introduction in evidence of each of said telegrams defendant objected upon the ground that the plaintiff had not alleged in his petition that C. K. Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said C. Baccarisse to make the contracts sued on, which objections the court overruled; and the defendant now here presents in open court, during the time required by law, and to the judge of the court, for his allowance and signature, this bill of exceptions to the ruling and action aforesaid; and the said bill is now here, in open court, allowed and signed, and ordered to be filed and to constitute a part of the record in this cause.

Signed this the 14th day of July, A. D. 1893.

T. S. MAXEY, *Judge presiding.*

48 Exception No. 2.

GEORGE W. RUSS
vs. No. 1918. } Defendant's Bill of Exception No. 2.
Count JOSEPH TELFENER.

Be it remembered, that during the progress of this cause, after all the evidence for plaintiff and defendant had gone to the jury and the law of the case had been argued to the court and the facts to the jury, the court of its own motion, among other things, charged the jury as follows:

"If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it. * * *

"If you find from the evidence that Baccarisse had authority from the

defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the Legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant can not avoid liability thus created."

The defendant, in open court, specially excepted to the giving of the charge herein set out at the time the same was read to the jury, upon the ground that there were no pleadings on the part of plaintiff authorizing such a charge, but the court refused to correct its error, and defendant now presents this bill of exception to the court, and prays that the same be allowed and signed and caused to be enrolled as part of the
49 record in this case, which is accordingly done in open court and within the time allowed by law.

Signed this the 13th July, A. D. 1893.

T. S. MAXEY, *Judge Presiding.*

Exception No. 3.

GEORGE W. RUSS
vs. No. 1918. } Defendant's bill of Exception No. 3.
Count JOSEPH TELFENER.

Be it remembered that during the progress of this cause, the only testimony introduced in evidence, by either the plaintiff or defendant, as to when the plaintiff filed his applications with the county surveyor of El Paso County for the survey of the 1813 sections of land described in his petition; or as to when said lands were surveyed; or as to when the field notes of the surveys were returned to the General Land Office; or as to what lands the plaintiff's applications included, was the following:

1. Plaintiff introduced in evidence certified copies of two applications made by him for the survey of the 1813 sections of land mentioned in his petition, and which were addressed to and filed by the county surveyor of El Paso County on October 4th and 5th, 1882, respectively.

2. Plaintiff next introduced in evidence the following certified copy from the Commissioner of the General Land Office, viz.: General Land Office, Austin, Texas. I, R. M. Hall, Commissioner of the Gen-
50 eral Land Office of the State of Texas, in accordance with the provisions of article 2253 of the Revised Statutes of the State of Texas, do make the following certificate of facts, viz.: On the 8th day of January, 1883, there was filed in this office by George W. Russ field notes of one thousand eight hundred and thirteen surveys of land situated in El Paso County, Texas, and surveyed for said Geo. W. Russ under the provisions of an act of the Legislature approved July 14, 1879, and amend-

atory act of March 11th, 1881, authorizing the sale of a portion of the public domain. The field notes of said surveys call for 640 acres each, situated in blocks A, B, C, D, E, F, G, H, I, J, and K, in El Paso County, Texas.

On the said 8th day of January, 1883, the said Geo. W. Russ filed in this office two applications or files, by virtue of which applications or files said 1813 surveys were made. Neither of said applications bear any date upon their face. On the back of one of said applications is the following endorsement, viz.: "Filed for record this 4th day of October, 1882, at 4:40 o'clock p. m. A. M. Randolph, Co. Sur. El Paso Co., Texas. recorded in Book No. 1, pages 68, 69, and 70, this the 7 day of November, A. D. 1882. A. M. Randolph, Sur. El Paso Co., Tex." On the back of the other application is the following endorsement, viz.: "Filed for record this 5th day of October, 1882, at 6 o'clock p. m. A. M. Randolph, Co. Sur., El Paso Co., Tex.," and recorded November 3d, 1882, 4:30 p. m.

The dates of said surveys, as given in their respective field notes, are as follows, viz.:

Surs. 1, 2, 4, 5, and 24 to 49, incl., block A, dated Oct. 20, 1882.
Surs. 50 to 108, incl., block A, dated Oct. 21, 1882.
Surs. 109 to 222, incl., block A, dated Oct. 22, 1882.
Surs. 223 to 320, incl., block A, dated Oct. 23, 1882.
Surs. 321 to 399, incl., block A, dated Oct. 24, 1882.
51 400 to 421, incl., block A, dated Oct. 25, 1882.
51 to 96, incl., block B, dated Oct. 16, 1882.
51 to 64, incl., block C, dated Oct. 26, 1882.
65 to 200, incl., block C, dated Oct. 27, 1882.
201 to 236, incl., block C, dated Oct. 29, 1882.
1 to 36, incl., block D, dated Oct. 18, 1882.
37 to 54, incl., block D, dated Oct. 19, 1882.
1 to 72, incl., block E, dated Oct. 27, 1882.
73 to 150, incl., block E, dated Oct. 28, 1882.
151 to 236, incl., block E, dated Oct. 31, 1882.
237 to 333, incl., block E, dated Nov. 1, 1882.
334 to 348, incl., block E, dated Oct. 30, 1882.
1 to 60, incl., block F, dated Oct. 30, 1882.
161 to 289, incl., block F, dated Oct. 31, 1882.
290 to 384, incl., block F, dated Oct. 30, 1882.
1 to 16, incl., block G, dated Nov. 3, 1882.
1 to 10, incl., block H, dated Nov. 3, 1882.
1 to 48, incl., block I, dated Nov. 3, 1882.
1 to 24, incl., block J, dated Nov. 9, 1882.
1 to 76, incl., block K, dated Oct. 13, 1882.

Receipts of the State Treasurer on file in this office show that the purchase money—50 cents per acre—was paid on twenty-five of the aforementioned surveys, viz., surveys 1 to 16, inclusive, in block G, and surveys 35 to 44, inclusive, in block I. There is no evidence that the purchase money was paid on the others. Said surs. all purport to have been made by A. M. Randolph, sur., El Paso county.

I certify that the above and foregoing is a true and correct statement of facts, as shown from the files and records of this office. In testi-
52 timony whereof I hereunto set my hand and affix the impress of my official seal this February 19, 1887.

[SEAL.] R. M. HALL,
Comm'r Gen'l Land Office.

Endorsed in the following words, to-wit:
Ex. z. Filed Febr'y 25, A. D. 1887. Sam. Hopkins, Clerk.

3. M. E. Groos, chief clerk of the General Land Office, testified that the plaintiff's application filed on Oct. 5th, 1882, as aforesaid, covered sections 1 to 48, inclusive, in block "I," of said certificate.

4. S. W. S. Duncan testified that the lands were surveyed on the dates mentioned in their respective field notes.

And be it further remembered, that after the above mentioned evidence had gone to the jury and the law of the case had been argued to the court and the facts to the jury, the court, of its own motion, among other things, charged the jury as follows: You are further instructed, that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could lawfully be assigned.

And be it further remembered, that before the jury had retired to consider of their verdict, the defendant, for the purpose of correcting the error in the charge of the court, above complained of, as well as the omission in the charge, and for the further purpose of having the law of the case given the jury as applied to the facts appearing in this bill of exception, presented in writing to the court, and before the jury had left the bar, the following special instructions:

53 GEORGE W. RUSS
vs. No. 1918.
COUNT JOSEPH TELFENER. } Special Charge No. 13.

Defendant asks the court to charge the jury as follows:

The court instructs the jury, that the "right, title, and interest" of plaintiff, in his application and files on land, and which he contracted to sell, was not a vested right on the first day of November, 1882, in or to

any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider or include in the measure of damages.

J. L. PEELER,
Attorney for Defendant.

Endorsed in the following words, to-wit: No. 1918. Geo. W. Russ vs. Count Joseph Telfener. Defendant's special charge No. 13. Filed July 11, 1893. D. H. Hart, Clerk. Refused. T. S. Maxey, Judge.

GEORGE W. RUSS
vs. No. 1918.
COUNT JOSEPH TELFENER. } Special Charge No. 14.

Defendant asks the court to charge the jury as follows:

You are instructed that the law required the field notes of the land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land.

J. L. PEELER,
Attorney for Defendant.

54 Endorsed in the following words, to-wit:

No. 1918. Geo. Russ *vs.* Count Joseph Telfener. Defendant's special charge No. 14. Filed July 11, 1893. D. H. Hart, clerk. Refused. T. S. Maxey, Judge.

The defendant, Count Joseph Telfener, specially excepted to that part of the court's charge herein set out at the time the same was read to the jury, but the court refused to correct its error, or to give to the jury either one of the defendant's said special instructions, numbers 13 and 14; to all of which rulings of the court the defendant then and there in open court excepted, before the jury had retired, and now presents this bill of exception to the court, and prays that the same be allowed and signed, and caused to be enrolled as part of the record in this case, which is accordingly done in open court and within the time allowed by law.

Signed this 13th July, A. D. 1893.

T. S. MAXEY, *Judge Presiding.*

Exception No. 4.

GEORGE W. RUSS
vs. No. 1918.
COUNT JOSEPH TELFENER. } Defendant's Bill of Exception No. 4.

Be it remembered, that during the progress of this cause, the hereinafter ruling and action of the court was at the time the same was made,

taken, and announced excepted to in open court by the defendant in above entitled cause, to-wit:

F. M. Maddox was a witness in this case, and testified that A. M. Randolph, who was county surveyor of El Paso county, Texas, in 1882, is dead and that he died four or five years ago. This witness further testified that he was a surveyor and had surveyed a great deal of land
55 in the western portion of the State and in the Pan Handle; that it was four miles around each section of land of 640 acres; that 58 sections of land could not be surveyed in a day by one surveyor; that 113 sections of land could not be surveyed in a day by one surveyor; that 97 sections of land could not be surveyed in a day by one surveyor; that 78 sections of land could not be surveyed in a day by one surveyor; that 45 sections of land could not be surveyed in a day by one surveyor; that 135 sections of land could not be surveyed in a day by one surveyor; that 35 sections of land could not be surveyed in a day by one surveyor; that 36 sections of land could not be surveyed in a day by one surveyor; that 72 sections of land could not be surveyed in a day by one surveyor; that 77 sections of land could not be surveyed in a day by one surveyor; that 85 sections of land could not be surveyed in a day by one surveyor; that 96 sections of land could not be surveyed in a day by one surveyor; that 60 sections of land could not be surveyed in a day by one surveyor; that 128 sections of land could not be surveyed in a day by one surveyor; that 94 sections of land could not be surveyed in a day by one surveyor; that 48 sections of land could not be surveyed in a day by one surveyor; that 76 sections of land could not be surveyed in a day by one surveyor; that the average number of miles that a man can survey in one day is 10 to 15 miles, but that he had run 28 miles on one occasion, but never but once; and on the occasion he surveyed 28 miles he rode on horseback over level prairie country, and had six flagsmen (front and back flagsmen), and never stopped to build a corner, and that the chainmen never stopped, and that they worked from sun up to sun down.

56 Only one man can handle the compass—do the scientific work, and the assistance of a large number of flagsmen and chain-carriers would not aid him in making speed.

On cross-examination by the plaintiff this same witness testified that by putting only two corners to each survey, you could, as an illustration, survey block "J," containing 24 sections, by running only 14 miles; that the distance around one section was 4 miles, which makes a total distance of 96 miles around 24 sections of land; that the more surveyors you have the more work you can do; that one surveyor could sorter supervise the other surveyors, but that he could not be with each surveying party, but could direct their general movements; that the amount of work that

could be done would increase according to the number of surveyors employed at a specified time, and the number of sections one surveyor could survey depends upon the number of men he has with him; and that the additional number of men would facilitate the surveyors in crossing streams, making set offs, etc.

On re-direct examination by the defendant, said witness testified that block "J" contained 24 sections and could by making only two corners to each survey be surveyed by running only 14 miles, but that 24 sections of land could not be surveyed by running 14 miles if four corners were made to each section, and if the surveyor only run 14 miles he would then be calling for corners that he had not made. Recross-examined, witness said that would be actual surveying on the ground; that is, what is termed actual surveying on the ground is work done on the ground by which you could identify a survey. This work would be that kind.

S. W. S. Duncan, witness for plaintiff, testified by deposition. As agent of plaintiff, that he made application and filed on the 1813
57 sections referred to in this suit. I made a contract for plaintiff with the county surveyor of El Paso county for making the surveys of said sections. There was employed by me in the survey and making the field notes, between 20 and 30 people all together. I employed the county surveyor, and all of his assistants and myself helped in making the survey and superintending the matter from making the application to finally turning the field notes over to plaintiff to file in the General Land Office. I do know that the survey was made and the field notes returned to the General Land Office because I superintended the survey and helped to take the field notes to the office, and saw plaintiff pay the filing fee of ($1.00) one dollar per section. On cross-examination the same witness testified that it was impossible for him to state by whom any section of the land in question was surveyed.

Upon the trial of the case, plaintiff admitted that the said A. M. Randolph's name is signed to each of the 1813 sets of field notes of the 1813 sections of land described in his petition.

The said Maddox was the only surveyor that testified in this case.

And be it further remembered, that before the jury had retired to consider of their verdict, the defendant, for the purpose of correcting an omission in the court's charge, and for the further purpose of having the law of the case given the jury as applied to the facts appearing in this bill of exceptions, presented in writing to the court and before the jury had left the bar the following special instruction:

GEORGE W. RUSS
vs. No. 1918. } Special Charge No. 16.
Count JOSEPH TELFENER.

Defendant asks the court to charge the jury as follows:

58 If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the ground, then and in such case they are instructed that such surveys are void, and for such sections plaintiff can not recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant.

J. L. PEELER, *Attorney for Defendant.*

Endorsed in the following words, to-wit:

No. 1918. Geo. W. Russ *vs.* Count Joseph Telfener, defendant. Defendant's special charge No. 16. Filed July 11, 1893. D. H. Hart, clerk. Refused. T. S. Maxey, judge.

The court refused to give to the jury said special instruction number 16; to which ruling of the court the defendant then and there in open court excepted, before the jury retired, and now presents this bill of exceptions to the court, and prays that the same be allowed and signed, and caused to be enrolled as part of the record in this case, which is accordingly done in open court and within the time allowed law.

Signed this the 13th day of July, A. D. 1893.

T. S. MAXEY, *Judge Presiding.*

59 *Telfener's Petition for Writ of Error.*

United States of America.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes Count Joseph Telfener by his attorney of record, J. L. Peeler, and respectfully represents to your honors in cause No. 1918, wherein he was defendant and George W. Russ was plaintiff, pending in the United States Circuit Court, Fifth Circuit and Western District of of Texas, at Austin, judgment was rendered at the July Term thereof, 1893, against him and in favor of said Russ for the sum of $518,440.50, on or about the 12th day of July, 1893, and that in the record, proceedings, and rendition of the judgment in said cause manifest error hath intervened to the great damage of him, the said Telfener; wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by said United States Circuit Court of Appeals, etc.

J. L. PEELER, *Attorney for Defendant Telfener.*

Allowed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

60 *Telfener's Assignment of Errors.*

GEORGE W. RUSS *vs.* No. 1918. COUNT JOSEPH TELFENER. } Suit pending in United States Circuit Court, Western District of Texas, at Austin.

Now comes Count Joseph Telfener, defendant in the above styled cause, and assigns the following errors:

First Assignment of Error.

The court erred in permitting the plaintiff, George W. Russ, to offer in evidence and read to the jury, over defendant's objection, the following telegrams from C. K. Westcott to C. Baccarisse, to-wit:

1. Oct. 26, 1882.

To Chas. Baccarisse:

Provided there is at least one milion (meaning acres of land), close at eighty, General (meaning the plaintiff) to undertake surveys and perfect things for issuance patent. Funds for commencing surveys shall be deposited immediately. Expert's favorable report and certified papers reach Count (meaning the defendant) say within time specified by you. Commission to be paid on certificate from Land Office that field notes are returned and patent will issue in Bosses' name (meaning defendant), he will pay State direct. Sign contract to mail or express certified copy file and map in duplicate; this will save much time and enable inspection probably in six days. Look up Presidio and Pecos affairs, mailing certified papers and maps. Wire before you leave.

C. K. WESTCOTT.

61 2. Oct. 27th, 1882.

To C. Baccarisse, San Tone:

Yours twenty-fifth was answered immediately. Why did you not wait after asking a reply knowing the thing to be so important. Go back and close at eighty as instructed.

C. K. WESTCOTT.

3. Oct. 28, 1882.

To C. Baccarisse, S. A.:

You never got my message of twenty-fifth because you did not wait for it. If you have received recent orders from Count (meaning the defendant) not to close at eighty wire me, if not, close at eighty. General (meaning the plaintiff) to undertake surveys and make everything straight for issuance of patents. Funds for commencing surveys shall be deposited immediately after Expert's favorable report reaches Count (meaning the defendant), say within time specified by you. Commission paid on receipt of certificate from Land Office, the field notes are got and patents.

will be issued. Count (meaning the defendant) will pay State direct. Sign contract and mail or express certified copy of file and map. This will save much time and enable to have land inspected probably within five or six days.

C. K. WESTCOTT.

4. Nov'r 1, 1882.

To C. Baccarisse:

Accept General's (meaning the plaintiff) offer at twenty-five cents for transfer his file, same to be made as suggested by him after verifying correctness of same with county surveyor and Land Office records.

62 Send immediately certified copies of file, map, and contract.

C. K. WESTCOTT.

And to the introduction in evidence of each of said telegrams, defendant objected upon the ground that the plaintiff had not alleged in his petition that C. K. Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said C. Baccarisse to make the contracts sued on, and all of which more fully appears from the defendant's bill of exceptions number one.

Second Assignment of Error.

The court erred in charging the jury as follows:

If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it.

If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the Legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant can not avoid liability thus created.

The defendant specially excepted to the giving of the charge herein set out at the time the same was read to the jury, upon the ground that there were no pleadings upon the part of plaintiff authorizing

63 such a charge, as is fully shown by defendant's bill of exceptions number two.

Third Assignment of Error.

The court erred in refusing to give to the jury defendant's special charge number thirteen, which is as follows:

GEORGE W. RUSS
vs. No. 1918.
Count JOSEPH TELEFNER,

Special Charge No. 13.

Defendant asks the court to charge the jury as follows:

The court instructs the jury that the "right, title, and interest" of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the first day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November first, 1882, you will not consider or include in the measure of damages.

J. L. PEELER, *Attorney for Defendant.*

As is shown by defendant's bill of exceptions number three.

Fourth Assignment of Error.

The court erred in refusing to give to the jury defendant's special charge number fourteen, which is as follows:

GEORGE W. RUSS
vs. No. 1918.
Count JOSEPH TELFENER.

Special Charge No. 14.

Defendant asks the court to charge the jury as follows:

You are instructed that the law required the field notes of the
64 land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land.

J. L. PEELER,
Attorney for Defendant.

As is shown by defendant's bill of exceptions number three.

Fifth Assignment of Error.

The court erred in refusing to give to the jury the defendant's special charge number sixteen, which is as follows:

GEORGE W. RUSS
vs. No. 1918.
Count JOSEPH TELFENER.

Special charge No. 16.

Defendant asks the court to charge the jury as follows:

If the jury find from the evidence that any of the sections of land described in plaintiff's petition, were not actually surveyed on the ground, then and in such case they are instructed that such surveys are void and

for such sections plaintiff can not recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant.

J. L. PEELER,
Attorney for Defendant.

As is shown by defendant's bill of exceptions number four.

65 Sixth Assignment of Error.

The court erred in overruling defendant's motion for a new trial, and in not setting aside the verdict rendered herein and granting him a new trial.

Wherefore the said defendant, Telfener, prays that the Honorable United States Circuit Court of Appeals for the Fifth Circuit reverse the judgment rendered herein against him and remand this cause for a new trial.

J. L. PEELER, *Attorney for Defendant Telfener.*

Cost Bond on Writ of Error.

GEORGE W. RUSS
vs. No. 1918. } Cost Bond on Writ of Error.
Count JOSEPH TELFENER.

Whereas, in the above numbered and entitled cause, pending in the United States Circuit Court, Fifth Circuit and Western District of Texas, at Austin, and at a regular term of said court, to-wit, on or about the 12th day of July, 1893, the said George W. Russ recovered judgment against the said Count Joseph Telfener for the sum of $518,440.50, with interest thereon from said date at the rate of six (6) per cent per annum, and all costs of suit, and from which judgment the said Count Joseph Telfener has sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit.

Now, therefore, we, Count Joseph Telfener, as principal, and
66 Frank Hamilton and Wm. C. Lott, as sureties, acknowledge ourselves bound to pay the said George W. Russ the sum of $1,000, conditioned that the said Count Joseph Telfener shall prosecute his writ of error to effect, and answer all costs only if he fails to make his plea good.

Witness our hands this the 9th day of August, 1893.

COUNT JOSEPH TELFENER,
per J. L. PEELER, *Attorney.*
FRANK HAMILTON,
WM. C. LOTT.

Examined and approved this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 1918. Geo. W. Russ vs. Count Joseph Telfener. Cost Bond on Writ of Error. Filed Aug. 9th, 1893. D. H. Hart, Clerk. By A. F. Robbins, Depty.

67 United States of America, *ss.*

The President of the United States:

To the Honorable Judges of the Circuit Court of the United States. 5th circuit, in and for the Western District of Texas, holding sessions at Austin, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before you, between George W. Russ, who is plaintiff, and Count Joseph Telfener, who is defendant, No. 1918 on the docket of said Circuit Court of the United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said Count Joseph Telfener, who is plaintiff in error herein, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, 30 days from this date, together with this writ, so that you have the same at the city of New Orleans, State of Louisiana, in said United States Circuit Court of Appeals for the Fifth Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 9th day of August, in the year of our Lord one thousand eight hundred and ninety-three, and seal — our said Circuit Court, at Austin, in the 117th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court U. S.
West. Dist. of Texas, at Austin.
By A. F. ROBBINS, *Dep'ty.*

Allowed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 1918. In U. S. Circuit Court of Appeals for 5th circuit, New Orleans, La. Count Joseph Telfener, plt'ff in error, *vs.* Geo. W. Russ, deft. in error. Writ of error to U. S. Circuit Court of Appeals for the 5th circuit. Issued 9th day of August, 1893. D. H. Hart, clerk. By A. F. Robbins, deputy.

68 *Citation in Error.*

The President of the United States:

To George W. Russ, or his attorneys of record, Mess. Fiset & Miller, greeting:

You are hereby cited and admonished to be and appear at and before the United States Circuit Court of Appeals for the Fifth Circuit in the city of New Orleans, State of Louisiana, thirty (30) days from this date, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the Western District of Texas—Fifth Circuit—sitting at Austin.

Wherein Count Joseph Telfener is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Test with seal of court at Austin, this 9th day of August, A. D. 1893.

Signed this 9th day of August, 1893.

T. S. MAXEY, *Judge.*

69 [SEAL] D. H. HART,
Clerk Circuit Ct. U. S.,
West. Dist. of Texas, at Austin.
By A. F. ROBBINS, *Depty.*

Aug. 14th, 1893.

We hereby waived being served with copy of foregoing citation and accept service.

FISET & MILLER, *Attorneys for George W. Russ.*

(Endorsed): No. 1918. In U. S. Circuit Court of Appeals for 5th Circuit, New Orleans, La. Count Joseph Telfener, Plaintiff in error, vs. Geo. W. Russ, Defendant in error. Citation in error. Issued 9th day of August, 1893, D. H. Hart, Clerk. By A. F. Robbins, Depty. Filed Aug. 14, 93. D. H. Hart, Clerk, by A. F. Robbins, Depty.

70 THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the Circuit Court of the United States in and for the Western District of Texas, do hereby certify that the above and foregoing on 69 pages contains a full, true, and correct copy of the proceeding had and orders entered in cause No. 1918, of George W. Russ

vs. Count Joseph Telfener, as the same appears of record and on file in this office.

Witness my hand and the seal of said Circuit Court at Austin, this 22d day of August, A. D. 1893.

[The seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

D. H. HART, *Clerk.*

By A. F. ROBBINS, *Deputy.*

Hearing and Submission.

NOVEMBER TERM, 1893.

WEDNESDAY, January 24, 1894.

EXTRACT FROM MINUTES.

COUNT JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error.

This cause was regularly called this day, and after argument by Mr. J. L. Peeler, for plaintiff in error, and by Mr. Franz Fiset and Mr. Charles Fred. Tucker, for defendant in error, was submitted for the consideration of the Court.

Judgment.

NOVEMBER TERM, 1893.

TUESDAY, February 6, 1894.

EXTRACT FROM MINUTES.

COUNT JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the Western District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, Count Joseph Telfener, and the sureties on the writ of error bond herein, Frank Hamilton and Wm. C. Lott, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

And afterwards, to-wit, on the 7th day of March, 1894, a petition for rehearing was filed in the said cause in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

NOVEMBER TERM, 1893. No. 183.

COUNT JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error.

ERROR TO UNITED STATES CIRCUIT COURT, FIFTH CIRCUIT, AND WESTERN DISTRICT OF TEXAS, AT AUSTIN.

Motion for Rehearing by Plaintiff in Error.

Now comes Count Joseph Telfener, plaintiff in error in the above styled cause, and moves this honorable court to set aside its judgment of affirmance rendered herein on the 6th day of February, 1894, and grant him a rehearing, for the following reasons:

FIRST.

Because this honorable court held that the first and second assignments of error were not well taken; and that the question of agency was raised by the pleadings, sufficient to fully inform each party that the lawful agency of both Baccarisse and Westcott would be an issue in the case, and that the amended answer impliedly admitted the agency of Westcott.

Now, in all seriousness, we contend that it is incumbent upon a party proposing to prove agency, to first plead it. This being true, let us see if the defendant in error did plead that C. K. Westcott was the agent of plaintiff in error. By an examination of his petition we find that he does not even refer to Westcott, therefore, for him to have proven that Westcott was the agent of the plaintiff in error or was authorized to instruct Baccarisse to execute the contracts in suit, he had to do so, if at all, by virtue of the answer of the plaintiff in error; and by reference to the answer, it is seen, after giving it a most liberal interpretation, that the plaintiff in error simply plead that if Baccarisse ever had authority to negotiate in the purchase of lands in Texas, it was merely as an employe under Westcott, but that neither Westcott nor any other person had a right to execute the contracts. The plaintiff in error did not allege that Westcott was his agent unless it was by implication; and we submit that such an implication could not benefit the defendant in error, because under every authority on this question, American and English, it is well settled that when a material fact is omitted on one side but referred to on the other, such fact must be directly averred, not by implication, but *expressly pleaded*, before the other side can take advantage of or introduce testimony under it.

We further contend, that if the plaintiff in error had even admitted that Westcott was his agent, it would not have availed the defendant in

error anything, because the third count of the answer consisted of a general denial, which put the defendant in error upon proof of his entire case, regardless of whatever else the plaintiff in error may have plead. Fowler v. Davenport, 21 Texas, 626, and authorities cited.

SECOND.

Because this honorable court held that the third assignment of error was not well taken, and that the defendant in error had a valuable and assignable right on the 1st day of November, 1882, in all the lands surveyed after that date.

Our position before the Supreme Court of the United States, and on the last trial of this case, was not the same. Before the Supreme Court we contended that the defendant in error had no right or assignable interest whatever in any of the eighteen hundred and thirteen sections of land. But the record there as well as here showed that all the sections, except ninety-eight, had been surveyed on and prior to the 1st day of November, 1882, the day on which the contracts were made. And thus, under the case of Jumbo Cattle Co. v. Bacon and Graves, 79 Texas, 5, the Supreme Court, without specially noticing the ninety-eight sections, intimated that the defendant in error had a valuable and assignable right in the lands.

On the last trial of this case, as well as here, however, our position was quite different; it was that the defendant in error only had a valuable interest in the lands surveyed on and prior to the 1st day of November, 1882, and that he had no interest at all, none which the courts could recognize or enforce, in the ninety-eight sections surveyed after that date; nor do we understand the Supreme Court as holding that he had any interest in the ninety-eight sections; they could not have done so, because the Supreme Court of Texas, in construing the Act of 1879, had expressly held otherwise, and it is our understanding that the Federal courts, in interpreting a statute of a State, always follow the interpretation placed on it by the courts of that State, especially in matters of this kind. The interest that the defendant in error had on the 1st day of November, 1882, in the ninety-eight sections of land surveyed after that date, was just such an interest as every other citizen, domestic or foreign, possessed — no more and no less; it was a piece of moonshine which he neither owned, controlled, nor could assign. Judge Stayton, the present Chief Justice of the Supreme Court of Texas, in discussing this identical question in the case of White v. Martin, 66 Texas, 344, said, that "no right should be deemed to vest in an applicant prior to a survey, prior to which time it might be appropriated by a pre-emptor, or by any responsible person, without infringing any vested right of a former applicant," and which was reaffirmed in Jumbo Cattle Co. v. Bacon and Graves, 79 Texas, supra.

THIRD.

Because this honorable court held that the fourth and fifth assignments of error were not well taken, and that it was wholly immaterial whether the surveys under the applications of the defendant in error were made and returned to the General Land Office within sixty days, or were returned at all; and also, whether the surveys made under the applications were actually made on the ground or consisted of office work.

It was the duty of the defendant in error to have had the field notes returned to and filed in the General Land Office within the time prescribed by law. He contracted to and did have them returned and filed, but it was after the expiration of the sixty days, except as to twenty-four sections, and hence every right was lost. It is true that section 3 of the Act of 1879 required the surveyor to return and file the field notes, but in performing such a duty he represented the person who had made the application, and paid him for his services, and nobody else; and it was the applicant's duty to see that the field notes were returned and filed in time, and if they were not, then he should suffer the loss. Section 9 of the act provided that should any applicant fail, refuse, or neglect to pay for the land, he should forfeit all rights thereto and should not thereafter be allowed to purchase the same. Now did this forfeiture and prohibition apply to the plaintiff in error? Certainly not, because he was not an applicant — he had not made any application, nor had he caused any lands to be surveyed and the field notes of same returned to the General Land Office. After a forfeiture had been declared, the plaintiff in error could have filed on these identical lands and have purchased them. The forfeiture provided in section 9 is reasonable. It is contained in the last section of the act, and was intended to apply only to those persons who had made the application, who had caused the land to be surveyed within ninety days, the field notes of same made out and returned within sixty days, and who then refused to pay for the land.

Again, if the surveys were not made on the ground then they were void. Bacon et al. v. State, 21 S. W. Rep., 149. And being void, the matter stood as if no survey had been made at all. Without a valid survey, as already seen, there was no right, title, or interest which the law could recognize.

Plaintiff in error respectfully represents that Franz Fiset and Clarence H. Miller, who reside in the city of Austin, State of Texas, are counsel for the defendant in error, wherefore he prays that said counsel be duly notified of this motion, if necessary, and that a rehearing be granted, etc.

J. L. PEELER,
Counsel for Plaintiff in Error.

I hereby certify that the foregoing is the motion for rehearing of the

plaintiff in error in the above styled cause, and that the same is made in good faith.

J. L. PEELER,
Counsel for Plaintiff in Error.

Rehearing Refused.

NOVEMBER TERM, 1893.

TUESDAY, May 29, 1894.

EXTRACT FROM MINUTES.

COUNT JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error.

Ordered, that the petition for rehearing filed in this cause be, and the same is hereby refused.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

NOVEMBER TERM, 1893.

(Filed February 6, 1894.)

COUNT JOSEPH TELFENER, Plaintiff in Error,
vs.
GEORGE W. RUSS, Defendant in Error.
No. 183.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

PARDEE, Circuit Judge, delivered the opinion of the court:

This case has been once before the Supreme Court of the United States, and is reported in 145 U. S., 522. That report contains a full statement of the general merits and pleadings in the case.

In the Supreme Court two questions were presented: first, whether the plaintiff below acquired any assignable interest in the real property described in the contract upon which the action was brought; and, second, assuming that he had an assignable interest, whether the rule for the measure of damages for breach of the contract for such interest by the defendant was correctly stated to the jury by the court.

The first question was discussed but not decided; the court, however, intimated "that if a right to purchase land for however short a period is vested in one it is a valuable right; and is, in that sense property, and, in the absence of express prohibition, would be therefore assignable."

The case was reversed and remanded because of error in the charge of the trial court as to the measure of damages. On the second trial, there

was another verdict for the plaintiff in the court below, and the case is brought here for review, on several assignments of error, which will be considered in order.

The first assignment of error relates to permitting the plaintiff to offer in evidence and read to the jury over defendant's objection certain telegrams from one C. K. Westcott to one C. Baccarisse in regard to executing the contract between plaintiff and defendant sued on; and the second assignment of error complains of the charge to the jury as follows:

"If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from and knowledge and consent of defendant, empowered Baccarisse to execute it.

"If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval and knowledge, to contract with individuals generally for the purpose of procuring lands under the Act of the Legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant can not avoid liability thus created."

The contract sued on purported to have been executed on the part of the plaintiff in error by one C. Baccarisse, agent.

The amended answer denies the authority of C. Baccarisse as agent, but impliedly admits the agency of C. K. Westcott, so that the question of agency was substantially raised by the pleadings, and the evidence tending to support or disprove the agency of either Baccarisse or Westcott could work no surprise. The bill of exceptions taken to the admission of the evidence complained of, and to the charge of the trial court in relation to such evidence, contains no statement of the facts otherwise proved or attempted to be proved in relation to agency, so as to enable this court to determine whether the evidence objected to was or was not admissible, or whether the charge of the court was relevant. The objection assigned to the admission of the evidence and to the charge of the court, is that the plaintiff did not allege in his pleadings that Westcott was defendant's agent, or that the said Westcott was authorized to empower the said Baccarisse to make the contract sued on.

As we have seen, the question of agency was raised by the pleadings, so far as to fully inform each party that the lawful agency of both Baccarisse and Westcott would be an issue in the case.

The charge of the court implies that evidence had been offered tending to show that Westcott had authority as agent of the plaintiff in error to empower Baccarisse, and that there was also evidence tending to show

that Baccarisse had authority direct from the plaintiff in error himself. In either case, the evidence objected to was admissible, and the charge complained of was proper. As the case is presented to us under the bill of exceptions, however, we are unable to determine the admissibility of the one, or the propriety of the other.

The third assignment of error is the refusal of the trial court to charge the jury, as follows:

"The court instructs the jury that the 'right, title, and interest' of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the 1st day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November first, 1882, you will not consider or include in the measure of damages."

The evidence relating to this matter shows that the plaintiff had made application in two instruments of writing for the survey of 1813 sections of land described in his petition, which was addressed to, and the applications filed by, the county surveyor of El Paso county, on October 4th and 5th, 1882, respectively. It shows also, that the surveys of said land, for which said Russ had made application, were made at and prior to the time of the execution of the contract sued on, saving and excepting 98 sections of 640 acres each, surveys of which were made between November 1st and November 9th, 1882. These surveys were filed in the General Land Office on the 8th day of January, 1883. The instrument executed between the plaintiff and the defendant November 1, 1882, was an executory contract by which the plaintiff for and in consideration of a sum of money promised to be paid by the defendant, agreed on the 15th day of November, 1882, to transfer and assign to defendant all his right, title, and interest in and to the land in question acquired by virtue of plaintiff's application. This contract was a valid and binding contract at the time it was entered into, unless it was prohibited by law or public policy, which is not contended.

Under this state of the law and of the evidence, the instruction asked for did not present the law of the case, and if technically correct as a general proposition was calculated to mislead, and was therefore properly refused. The actual charge of the court given in this regard is as follows: "You are further instructed that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could be lawfully assigned;" and it seems to have correctly presented the law of the case.

The fourth assignment of error complains of the refusal of the trial court to charge the jury, as follows:

"You are instructed that the law required the field notes of the

land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land."

This assignment relating to the filing in the General Land Office of the surveys made under the application of the plaintiff in the court below, may be disposed of with the fifth assignment of error, which relates to a question as to whether the surveys made under the plaintiff's application, and returned to and filed in the General Land Office, were actual surveys on the ground, or were "chimney corner" or office surveys.

In the view that we take of the case, it is wholly immaterial whether the surveys made under the application of the plaintiff and returned to the General Land Office, were made and returned within sixty days after the date of the survey, or were returned at all; and, also, whether the surveys made under the said application were actually made on the ground or were office surveys.

With regard to the return of the surveys to the General Land Office with the field notes within sixty days after the date of the survey, a reference to the law will show that the duty of making such return devolved not upon the applicant, but upon the surveyor, and that the failure to make such return within the time on the part of the surveyor is not a reason for forfeiture under the terms of the act.

The ninth section of the act is the only section of the same which provides for the forfeiture of the rights secured by the application, and that provision is, that should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre, within the time prescribed in section 5 of the act, he shall forfeit all rights thereto, and he shall not be allowed thereafter to purchase the same. But be this as it may, the contract sued on is an agreement to transfer from Russ to Telfener all and singular the rights, title, and interest that the said Russ now has or may be entitled to in and to said lands, by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that if such actual surveys had been made, he (Russ) would cause them to be returned and filed in the General Land Office at any time or in any manner whatever. The contract made the same day between the same parties, provided that Russ, at his own proper cost and expense, should make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and in the General Land Office of the city of Austin, Texas, in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made

under the contract first mentioned, at the time agreed on, to-wit, November 15, 1882.

As it is conceded that Telfener made default under the first mentioned contract on the 15th of November, 1882, and that the sale and transfer under said contract was never carried out, the second mentioned contract became wholly inoperative and irrelevant; and the rights of the plaintiff became fixed, definite, and certain on the 15th of November, 1882, at the time defendant Telfener made default. Under these circumstances, we fail to perceive any obligation resting upon Russ to either complete the surveys or file the same in the General Land Office. Whatever was done by Russ after the 15th of November, to perfect the surveys and file the same, was done at his own cost and at his own risk, and could in nowise affect the plaintiff in error, Telfener, because the rule for damages in the case was, as declared by the Supreme Court in Telfener v. Russ, supra, as follows:

"On the 15th of November, he (Russ) possessed all the right to the land which he ever possessed; and assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

The sixth assignment of error, is that the court erred in overruling the defendant's motion for a new trial, and in not setting aside the verdict rendered and granting a new trial.

It is well settled that a refusal to grant a new trial can not be assigned as error. On the record, as presented to us, we find no reversible error, and therefore we are are compelled to affirm the judgment.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I, James M. McKee, clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing sixty-two pages, numbered from one to sixty-three, inclusive, contain a true copy of the record, pleas, proceedings, opinion, and all papers in the case of Count Joseph Telfener, plaintiff in error, v. George W. Russ, defendant in error, No. 183, November Term, 1893, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the city of New Orleans, this 31st day of July, A.D. 1894.

JAMES M. McKEE,

[SEAL] Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Office Supreme Court, U. S.
FILED,
MAR 6 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

COUNT JOSEPH TELFENER,
PLAINTIFF IN ERROR,

v.

GEORGE W. RUSS,
DEFENDANT IN ERROR.

No. 462.

JOSEPH WHEELER,
CLARENCE H. MILLER,
Counsel for Geo. W. Russ.

Questions asked by the Justices on the Oral Argument, and Answers thereto.

Question by MR. JUSTICE BROWN:

Is not the judgment a very large one? What did Russ lose that he should recover such an amount?

This question involves the measure of damages, and that was decided on the former appeal of this case (Telfener *v.* Russ, 145 U. S. 532). If the subject-matter of the contract was a valuable assignable right, and Russ performed

his part of the contract, or was ready, able, and willing to do so, but was excused from so doing by Telfener's default, and the correct measure of damages, as laid down by this court, was given, then the verdict should stand. But the merits of this case are against Telfener. He deliberately entered into the contract knowing what he was getting. At that time the lands were worth 80 cents an acre—the price, including cost of survey, he was to pay. If Russ had not sold to Telfener he (Russ) might have sold to some one else who would have acted honestly and paid him. Russ lost this chance of selling to others from November 1st to 15th, *i. e.*, from date of the contract till Telfener defaulted. When Telfener made default fifteen days thereafter, the price of the land had fallen. Did Russ not thereby lose something of value—as valuable as what he claims Telfener owes him? The loss of a chance to sell for a few days may mean the loss of a fortune. It is a common occurrence in cotton and stock transactions and in real estate values especially that depend on boom prices. These contracts, however, are not delared by the courts to be without consideration when the prices fall and the buyer loses money. In all business contracts each party takes his chance of making or losing. If the lands had gone up in value to $1.50 an acre and Russ had refused to convey, Telfener would demand his profits. If a miner knows of a valuable mine and locates on it, can he not contract to sell it for a large sum and enforce the payment? Yet, what did he lose? He might have found the mine by accident and spent little to locate it.

The judgment is large; but if parties deal in large transactions must they not expect, if they exercise bad judgment, to lose heavily? If they succeed at one stroke they make fortunes. Can they, then, complain if by one bad step they lose fortunes? Assuredly the same legal prin-

ciples apply to this case as if the transaction had been about a dozen sections instead of over a million acres.

Our client acted honestly, in good faith. So found the jury, the trial judge, and circuit court of appeals. We only ask that this court sanction the just principle that Telfener be forced to do likewise.

Question by MR. JUSTICE SHIRAS:

Has the supreme court of Texas construed sec. 6 of the act; that is, as to the number of tracts one person could apply for?

Section 6 of original act was amended in 1881, and Russ, in October, 1882, made his application to purchase and survey the land. The amended section, under which Russ made his application, reads as follows:

"SEC. 6. These lands shall be sold in tracts of 640 acres each, unless "precluded by previous surveys, in which event the purchaser must in- "clude all the vacancy, and no tract shall have a greater frontage on any "navigable stream or permanent water than one-half the square of such "survey, excepting where surrounded by other surveys."

Section 2 reads:

"That any person, firm, or corporation desiring to purchase *any* of the "unappropriated lands . . . may do so by causing the tract or *tracts* " . . . to be surveyed," &c.

In section 5 it is said:

"Said commissioner shall issue to said person, firm, or corporation a "patent for the tract or *tracts* of land so surveyed and paid for."

The use of the language "tract or *tracts*" shows that it was contemplated that a person, firm, or corporation should have the right to apply for and purchase more than one tract of 640 acres.

This construction is upheld in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5).

In that case Bacon and Graves made application under the act July 14, 1879, and amendment of 1881 of section

6 for 27 tracts of 640 acres each; that is, 17,280 acres. The application was for the land in one body to be surveyed in 640-acre tracts. The lands were surveyed under this application before the repeal of the act. In regard to the construction of section 6 as amended, the court said:

"In our opinion this was not intended to prescribe or affect the form "of the application. It simply prescribed the amount to be purchased "in one survey. Its main object was probably to cause the lands which "should be sold to be surveyed into sections with marked boundaries "for the convenience of holders under conveyances from the purchasers. "It was hardly practicable to designate the boundary of each section "desired to be purchased without a survey, and the act contemplated a "survey after the application. Two surveys were certainly not required."

The court held that the one application for the 27 tracts, aggregating 17,280 acres, was valid under the act in question.

This conclusively shows that the number of sections that one person, firm, or corporation could apply for and purchase was not limited by section 6.

This construction is further corroborated by the statement in White *v.* Martin (66 Texas, p. 343), where the court says:

"The act itself indicates a desire to raise money by sale."

Question by Mr. JUSTICE FIELD:

Is it not true that no right to complete the purchase from the State vested till the purchase money was paid?

This question is directly answered by the decisions of the supreme court of Texas.

In White *v.* Martin (66 Tex. 340) the application for purchase was made November 23, 1882, and the survey was made December 21, 1882. The act in question was repealed January 22, 1883, before anything was done but filing the application and making the survey. The field-notes and maps were not filed in General Land Office till

January 30, 1883, more than a week after the repeal of the law. The question was raised as to whether the applicant acquired a vested right before the repeal. The court said (66 Texas, 344):

"How may the applicant become a purchaser? The statute answers "the question. He 'may do so by causing the tract or tracts which "'such person, firm, or corporation desires to purchase to be surveyed.' "When this is done as the act contemplates, then, and not before, the "State contracts, upon the purchaser's complying with the other require- "ments of the act, that it will convey to him the land surveyed. When "this point was reached, there existed an executory contract which gave "the purchaser a vested right, upon complying with his part of the con- "tract, to have the land purchased, of which subsequent legislation can- "not deprive them.

"On the faith of the State's promise, the applicant, in good faith, ex- "pends money to have the lands surveyed or incurs obligation to pay." . . .

"The survey was made for the appellees within the time prescribed by "law and thus was vested his right." . . .

"The ninth section declares that if the applicant fails, refuses, or "neglects to pay for the land within the time prescribed, 'he shall for- "'feit all right thereto.'

"The right cannot be forfeited before it exists, hence we have the "clear declaration in the statute that it is not the payment of the pur- "chase money which vests the right to have the land, but that the right "vests in the person who has had the survey made, which, however, may "be lost by failure to comply with the other terms required of him."

Comment could not make this language plainer. The survey vests the right and not the payment of the money.

The same question arose and was decided in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5). There the application was made December 1, 1882, and surveys made January 19 and 20, 1883, two days before the law was repealed. It is not stated when the other steps toward securing patent were taken except that they were taken within sixty days after the survey. The court said (79 Texas, 12):

"The question then is as to the effect of the act of January 22, 1883, "which repealed the acts under which appellees made application to

" purchase the lands. The application had been made and the land had " been surveyed when the repealing act took effect. Had the appellees " then acquired a vested right which the legislature could not take " away? . . . The ruling in White *v.* Martin (66 Texas, 340) is " decisive of the question. . . . In the case cited it was held there " was a vested right which was not destroyed by the repealing act."

In Campbell *v.* Wade (132 U. S. 34) the question did not arise as no survey was made before the repeal. Merely an application was made before repeal, and hence that case is not authority on the point under discussion. It seems, however, that Mr. Justice Field, who rendered the opinion, recognized the correctness of our contention. He said:

" But for this declaration of the act, we might doubt whether a right " to purchase could be considered as conferred by the mere survey so as " to bind the State."

This clearly means that the act declares that a right to purchase is conferred by the mere survey so as to bind the State.

This question was not decided by this court on the former appeal of this case, but its determination was expressly postponed. Hence the remarks of Mr. Justice Field in the opinion as to when the right to purchase vested are *dicta*. He intimates that the right to purchase did not vest till the map and field-notes were filed in the General Land Office, which is directly contrary to the ruling in the Texas cases above cited and quoted.

Question by Mr. Justice Field:

Did Russ acquire any right of any kind by his application?

This question is answered in Hobert *v.* Wilson, 31st Southwestern Reporter, 711. In that case the question was whether the first applicant acquired a right of preference over subsequent applicants. The court said:

"The law awards the land to the first applicant who is able to make "affidavit to actual settlement, and comply with the other requirements "of the statute; and the fact that some other person may have preceded "him in settling thereon, but not in making application to purchase, will "not deprive him of the right thus guaranteed."

In the Yosemite Valley case (15th Wallace 77) and Frisbie *v.* Whitney (9 Wallace, 196) this court decided that a pre-emptor acquires by settlement with a view of pre-emption a privilege in case the lands are offered for sale that he may purchase in preference to others, although he acquires thereby no vested right against the United States. Clearly, then, these cases are applicable to the rights of an applicant under the law in question, if the analogy between the inchoate right of a settler and the inchoate right of an applicant to first have the survey made holds good. We think the analogy is complete. The end in view in the one case is to encourage settlement, and in the other to encourage sales of land. It would be unjust to the settler not to give him preference, and so it would be to the applicant. The settler expends his time and money in settling on the land; the applicant expends his time in seeking out the lands and his money in paying filing fees. If it be admitted that the applicant expends less time, would that make a difference? One settler expends less time and money than another, but that makes no difference. Russ may have spent a great deal of time and money in locating these lands, ascertaining their metes and bounds, courses and distance, and sending out to El Paso county to have the files made.

But the act itself is clear on this point, as appears from a comparison of sections 1 and 8.

Section 1 of the act provides that any party shall have the same right of pre-empting these lands as he may have had prior to the passage of the act.

Section 8 declares that after the survey no person should file or locate upon the land so surveyed. Hence it follows that a responsible party should by filing his application have the exclusive right, except as against pre-emptors, for the period of three months to have the land surveyed.

Any other construction would have defeated the purpose of the act—that is, the sale of the land—for, unless an applicant had some protection against subsequent applicants, he would not undergo the trouble and expense necessary in making the application. He would have had no security whatever that his time and labor would not have been lost.

Question by MR. JUSTICE FIELD:

Was the application for a survey or for purchase?

It was both. In the petition it is alleged that Russ made application, under the regulations of the land commissioner, to the surveyor for the survey and purchase of the land (Rec. p. 2). Section 7 of the act imposes the duty upon the land commissioner to make regulations on the subject. These regulations are not in the record nor is a copy of the application.

The application to the surveyor is the only application a would-be purchaser makes to purchase. It is the first step toward acquiring title, and why should it not be considered as an application to purchase as well as survey? In White *v.* Martin (66 Texas, 343) the court said:

> "The application evidences a desire to purchase, that is, to acquire "the right to have the land applied for by further complying with all "terms of the act."

The terms to purchase were fully known on both sides and needed no preliminary negotiation to settle them. The land was identified by metes and bounds, courses and distance in the application. The next step was a survey

which conferred upon the applicant a vested right. If, then the application was not for purchase, the purchase would be made without application to purchase, because, after the survey, it would then be rather late to speak of the subsequent steps being a mere application to purchase.

Section 9 of the act reads, "Should any applicant for the purchase of public land fail," etc., and by this language upholds our contention. We do not think, however, that it is material what the application is called. The answer to this question, whatever it is, cannot affect the real principles upon which Russ is entitled to recover.

Question of Mr. JUSTICE SHIRAS:

Does the reference in section 3 to "responsible parties" have any bearing upon the right of assignment?

Section 3 reads:

"It shall be the duty of the surveyor to whom application is made by "responsible parties to survey the lands designated in said application, "etc."

If the purpose here was to prevent an assignment to irresponsible parties so as to protect the State against the failure to promptly pay the purchase money, the language would have been more explicit and clear in expressing that idea; because, after the survey, the surveyor no longer has anything to do in the matter, and an irresponsible party might hold the lands for 120 days without forfeiting the rights secured by the survey and without paying the money. The State, if the purpose was to prevent assignments, would have made that purpose plain, especially as the general rule of law was and is to sustain assignments where there is no express prohibition against them. This is the doctrine announced in Graham *v.* Henry (17 Tex. 164), approved by the supreme

court of Texas in Davis *v.* Brogan (32 Southwestern Reporter, 874). It is further announced in strong language in Lamb *v.* Davenport (18 Wallace, 307), the head-note of which reads:

"Unless forbidden by some positive law, contracts made by actual "settlers on the public lands concerning their possessory rights, and "concerning the title to be acquired in future from the United States, "are valid as between the parties to the contract, though there be at the "time no act of Congress by which the title may be acquired, and "though the Government is under no obligation to either of the parties "in regard to the title."

See further the authorities in our supplemental argument.

In view of these authorities, and the fact that it was to the interest of the State not to restrain the traffic in these lands, but in every way to encourage it so as to raise money by the sales, we submit that the expression in section 3 does not evidence any intention by the legislature to prohibit assignment of rights acquired under the law in question.

Question by MR. JUSTICE FIELD:

Was it not a physical impossibility that the land was surveyed on the ground in the time stated?

If Russ acquired by his application alone a valuable right that was assignable, and if the default of Telfener to pay the money November 15, 1882, excused Russ from further performance on his part (Anvil Mining Co. *v.* Humble, 153 U. S. 551), then the judgment should be affirmed without considering this question. We are confident that the authorities cited in our briefs sustain this position, and that this court will not get to the question here asked.

Again, the point whether the surveys were actually made was an afterthought with Telfener, not even raised

when the case was formerly before this court, and which had no effect whatever in causing him to fail to carry out his contract. He could have obtained his patents to the land whether the surveys were actually made or not, because Russ actually obtained patents to 25 of the sections.

It is alleged in the petition that no adverse claim has ever been asserted to the lands in question (Rec., p. 6), and hence the only person who should have raised a question as to the validity of the surveys was the State. As the State was not disposed to raise that issue, and it would not have prevented issuance of the patents, we submit that it has no place in this controversy.

If the court, however, insists upon going into this question, the direct evidence is that the surveys were made on the ground; the certificate of the surveyor so states, and the expert evidence relied upon to overcome this does not, when carefully considered, show that it was even improbable that the surveys were actually made.

The greatest number of sections surveyed in one day was 208. These were surveyed October 27, in two blocks of 72 and 136 sections, respectively. (Rec., p. 30.) Maddox testified that putting only two corners to each section would be surveying on the ground—that is, work done on the ground by which you could identify a survey. (Rec., p. 33.) There is no evidence in the record to the contrary, and this view is corroborated by similar acts of the Texas legislature. (Laws, 1879, p. 10, sec. 8, and Laws, 1881, p. 66, sec. 16.) Duncan testified, and was not contradicted, that he superintended the surveys and employed to do the work the surveyor and his deputies, the entire surveying force, numbering between 20 or 30 people altogether. (Rec., p. 34.) The law, Tex. Rev. Stat., 1879, Art. 3853, authorized special deputies to assist the surveyor. There were then a number of surveying parties

at work, between 6 and 10 different parties. The said blocks of 72 and 136 sections were described in the application by "metes and bounds, courses and distance." See allegation in plaintiff's petition (Rec., p. 2). Hence, there must have been a previous preliminary survey. The relative location in said blocks of the sections to each other—that is, the geometrical outlines of each block—is not in the record, and hence we may take that form easiest to be surveyed. (Corinne Company *v.* Johnson, 156 U. S. 574). If the smaller block was 6 sections wide and 12 sections long it could have been surveyed, fixing two corners to each section, by running 41 miles. Two surveying parties then, by surveying 20½ miles each, could have done this work. Maddox, however, surveyed in one day 28 miles. So, if the larger block of 136 sections was 10 wide and 13½ long, it could have been similarly surveyed by running 75½ miles. Four surveying parties, then, by surveying less than 19 miles each, could have done this work. This would require 6 surveying parties to survey the two blocks, and as it only requires 3 persons to survey, and there were between 20 and 30 persons engaged in the work, it was not only not physically impossible to survey the land in the time stated, but was practicable and not even difficult, according to the testimony of Maddox, upon whom alone counsel depended to show that the surveys could not have been made on the ground.

The problem, however, above worked out as one way by which it was possible to make the surveys in the time stated, was a problem that no court should be required to submit to a jury, especially not at the request of a party who could have produced copies of the maps of the surveys, filed in the land office, showing the relative locations of each section.

But if there were merit in the contention of counsel for

plaintiff in error, the question was not properly raised in the trial court. The charge asked by him and refused by the court was defective in not defining to the jury what, under the law, would be an office survey and what a survey in the field. Without instructions from the court on that material point, the jury could not properly have decided the issue. We understand the practice in the federal courts to be that a charge which is not correct may be rightfully refused by the trial judge. The charge in question reads:

"If the jury find from the evidence that any of the sections of land "described in plaintiff's petition were not actually surveyed on the "ground, then and in such case they are instructed that such surveys "are void, and for such sections plaintiff cannot recover; and if the "jury should find that none of said sections were actually surveyed on "the ground, then they are instructed to return a verdict for the "defendant."

But should we be wrong in the above contentions, still this court cannot go into the question whether the land was surveyed on the ground, because none of the bills of exception state that the record contains all the testimony that was introduced to show that the surveys were actually made. In Corinne Co. *v.* Johnson (156 U. S. 576) the court says:

"Now the defect in this record which is fatal to the case of the plain-"tiff in error is that nowhere is it shown that all the testimony received "on the trial is preserved. Under such circumstances we are not at "liberty to assume. . . . that there was not testimony which con-"clusively established the existence of some one or more of those ex-"ceptions. . . . The presumptions are all in favor of the rulings of "the trial court."

Question by MR. JUSTICE FIELD:

Is it not true that Russ, when he made the contract, had no rights, and therefore could convey none?

Suppose, for an instant, this is true, still the contract

was to convey such title as he then had or might thereafter acquire, and as the surveys were completed on the 9th of November and the conveyance of his title was not to be made until the 15th of November, he, on that date, did have, by virtue of the surveys, a vested right to complete the purchase. In Lamb *v.* Davenport (18 Wallace, 307) it is expressly decided that a contract concerning a title to be acquired in the future is valid as between the parties to the contract, though at the time of contract there are no rights as against the United States. So in Richardson *v.* Washington (31 Southwestern Reporter, 614) the Texas supreme court announce the doctrine that a contract concerning a right or title to be wholly acquired in the future is valid and enforceable. These cases completely answer this question.

Moreover, this question is raised by the assignment of error only as to the 98 sections surveyed after November 1, 1882. Hence the court will only consider the 98 sections of 640 acres each, aggregating 62,720 acres. The total number of acres involved under the charge and verdict was 1,144,320, and the verdict principal amount was $286,080; that is, at the rate of 25 cents per acre or the total amount claimed.

Therefore, even if the court should sustain the contention as to the 98 sections, the cases of Decatur Bank *v.* St. Louis (21 Wallace, p. 294) and Walbrun *v.* Babbitt (16 Wall., p. 577) decide that the court will not reverse but will reform the verdict by deducting the 98 sections at 25 cents an acre and interest thereon.

The 98 sections would amount to $15,680, and the interest on this amount at 8% to July 12, 1891, and at 6% from July 12, 1891, to July 12, 1893, would be $12,739,059.

This would leave the principal reformed verdict $270,400, and the total reformed verdict, including interest, would be $501,528.16.

Question by MR. JUSTICE FIELD:

Were the field-notes returned in time?

We think the arguments in our brief answer this question. But if they do not, then it is immaterial, as the failure to file them in time was no ground of forfeiture (New York L. Co. *v.* Gardiner, 32 S.W. Rep. 786), and was so treated by the land officials who issued patents on 25 sections.

We insist that the question as to Bacarrisse's agency is not before this court. The assignment of error in the circuit court of appeals was to the point that under the pleadings no evidence that Bacarrisse received his authority through Wescott was admissible, and that there should have been no charge to the jury as to Wescott's agency. In defendant's answer that issue was raised and hence the evidence and charge were proper. This point was fully discussed and Texas authorities cited in the argument before the circuit court of appeals. Counsel for plaintiff in error was satisfied with the ruling on that point in that court and does not present it here. He stated in his oral argument in this court that he does not rely upon it. The judgment should be affirmed.

JOSEPH WHEELER,
CLARENCE H. MILLER,
Counsel for Geo. W. Russ.

162 U.S. 178

Office Supreme Court, U. S.
FILED
OCT 6 1894
JAMES H. McKENNEY,
Clerk

162-178

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 813

COUNT JOSEPH TELFENER, Petitioner,

vs.

GEORGE W. RUSS.

Petition for Count Joseph Telfener for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

J. L. PEELER, for Petitioner.

In the Supreme Court of the United States.

COUNT JOSEPH TELFENER, Petitioner.

vs.

GEORGE W. RUSS.

Petition for writ of certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination the case of Count Joseph Telfener, Plaintiff in Error, vs. George W. Russ, Defendant in Error.

To the Honorable the Supreme Court of the United States:

The petition of Count Joseph Telfener respectfully shows to this honorable court as follows:

That on the 14th of July, 1879, the Legislature of Texas passed a law entitled: "An act to provide for the sale of a portion of the unappropriated public lands," etc. The sections bearing on the questions involved are—

"Sec. 2. That any person, firm, or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor to whom application is made by responsible parties to survey the lands designated in said application within three months from the date thereof, and, within sixty days after said survey, to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

"Sec. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed, to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of

the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to such person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for.

"Sec. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one vara per acre for each survey of three hundred and twenty acres or less, and three-fourths of one vara per acre for all other surveys.

"Sec. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

"Sec. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm, or corporation who shall pay into the treasury the purchase money therefor."

That this act was amended on March 11, 1881, by extending its provisions to other counties, and making section 6 read as follows:

"Sec. 6. These lands shall be sold in tracts of 640 acres each, unless precluded by previous surveys, in which event the purchaser must include all the vacancy, and no tract shall have a greater frontage on any navigable stream or permanent water than one-half the square of such survey, excepting where surrounded by older surveys."

That on January 22, 1883, both acts were repealed, but while they were in force, it is claimed by said George W. Russ that he entered into a contract with petitioner on the 1st day of November, 1882, not personally, but with an agent, by which he sold and petitioner purchased the right he claimed to have in about one million acres of land, agreeing to pay therefor twenty-five cents an acre.

That the contract claimed, briefly stated, is as follows:

"Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue of an act of the Legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at fifty cents per acre, said application having been made in October, 1882, and duly filed in the surveyor's office in El Paso county; and

"Whereas, said Count Telfener is desirous of purchasing from the said Russ all his rights, title, and interest under and by reason of said application.

"In consideration of the transfer of all such rights as the said Russ had by reason of such application, petitioner agreed to give him twenty-five cents per acre for each and every acre of land covered by his said application."

That it was agreed in the contract that ninety per cent of the said twenty-five cents should be paid (the application having been found to be good and regular), on the 15th day of said November, and that thereupon said Russ would execute and deliver to the petitioner any and all deed or deeds or other instruments that might be proper or necessary to convey, transfer, or assign to him all and singular the rights, title, and interest that he, the said Russ, then had or might be entitled to in and to said lands by reason of such applications and files, and that on the completion of the surveys and field notes the residue should be paid.

That on the 16th June, 1883, said Russ instituted suit on said contract to recover said twenty-five cents per acre, alleging that he complied with said contract, but that petitioner failed in every particular.

The petitioner filed his answer, consisting of demurrers, general denial, specially alleging that C. Baccarisse had no authority to make such contract, and that said land was not actually surveyed on the ground, and hence the field notes to same were void.

That afterwards this cause was tried in the United States Circuit Court, Fifth Circuit and Western District of Texas, at Austin, and a judgment rendered in favor of said Russ, a citizen of Texas, against petitioner, a resident of Rome, Italy, on the 11th July, 1893, for the sum of $518,440.50. Thereupon petitioner duly removed said cause to the United States Circuit Court of Appeals for the Fifth Circuit by writ of error, which was docketed in said Circuit Court of Appeals as No. 183, styled Count Joseph Telfener, Plaintiff in Error, vs. George W. Russ, Defendant in Error, and was heard upon such writ of error by said Circuit Court of Appeals, who, upon such hearing, affirmed the judgment of the court below on the 6th February, 1894.

That petitioner, in due time, filed a petition for rehearing in said Circuit Court of Appeals, which was by said court overruled on the 29th May, 1894.

That all the proceedings and holdings in said cause of said Circuit Court and said Circuit Court of Appeals will more fully and at large appear in the certified record filed herewith.

That this cause has been once before this honorable court, and is reported in 145 United States, 522, but that the report does not contain a full statement of the pleadings and questions now presented.

That your petitioner submits there was error and manifest error in the holdings and rulings of said Circuit Court of Appeals in said cause, in this:

1. The undisputed evidence shows that said contract was made on 1st

November, 1882, and that after that date the said Russ caused ninety-eight sections of said land to be surveyed; that notwithstanding these facts and the decision of the Supreme Court of Texas in the case of White v. Martin, 66 Texas, 344, as follows: "*No right should be deemed to vest in an applicant prior to a survey*, prior to which time it might be appropriated by a pre-emptor or by any responsible person without infringing any vested right of a former applicant," the said Circuit Court of Appeals held that the said Russ had a valuable and assignable right on 1st November, 1882, in said ninety-eight sections of land.

2. Section 3, Act 1879, required all field notes to be returned to and filed in the General Land Office within sixty days after the survey; the testimony shows that out of 1813 sections of land surveyed only the field notes to twenty-four sections were returned and filed in time; yet the said Circuit Court of Appeals held that it was wholly immaterial whether the surveys under the applications of said Russ were made and returned within sixty days, or were returned at all.

3. The testimony contained in the record of this cause further shows that said land was not surveyed on the ground, but that the field notes to same must have consisted of office work; that although the Court of Civil Appeals of Texas in the case of Bacon et al. v. State, 21 S. W. Rep., 149, decided that such surveys were void, the said Circuit Court of Appeals held that it was immaterial whether the surveys were actually made on the ground or consisted of office work.

That all three of the above questions were presented to the said Circuit Court and the Circuit Court of Appeals, and were by said courts decided in favor of said Russ.

Your petitioner thus respectfully submits that this is a case involving questions of gravity and importance; that the decision of the United States Circuit Court of Appeals complained of is contrary to law; that the judgment rendered herein is for over half million dollars, and is against the evidence and every principle of reason; that in furtherance of justice and because your petitioner is otherwise remediless, the writ hereinafter prayed for should be directed to issue.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under seal of this honorable court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Circuit Court of Appeals to certify and send to this court on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said cause entitled Count Joseph Telfener, plaintiff in error, v. George W. Russ, defendant in error, number 183, to the end that said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of

the courts of the United States, and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the provisions of said act; and that said judgment of said Circuit Court of Appeals in said cause and every part thereof be reversed by this honorable court.

And your petitioner will ever pray, etc.

COUNT JOSEPH TELFENER.
By J. L. PEELER,
His attorney.

STATE OF TEXAS,
County of Travis.

Before me, the undersigned authority, on this day personally appeared J. L. Peeler, who, after being duly sworn, on his oath says that he is counsel for Count Joseph Telfener, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, and in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read said petition by him subscribed, and that the facts therein stated are true.

J. L. PEELER.

Sworn to before me and subscribed in my presence this nineteenth day of September, 1894.

[SEAL] JOHN W. BRADY,
Notary Public, Travis County, Texas.

We hereby take notice that the foregoing petition will be filed in the Supreme Court of the United States, accept service, and waive time of same.

S. R. FISHER,
HANCOCK & SHELLEY,
C. H. MILLER,
FRANZ FISET,
Counsel for said George W. Russ.

September 20, 1894.

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 813

COUNT JOSEPH TELFENER, Petitioner,

vs.

GEORGE W. RUSS.

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER.

J. L. PEELER, of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No.....

COUNT JOSEPH TELFENER, Petitioner,

vs.

GEORGE W. RUSS.

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER.

This cause has been once before this honorable court, and is reported in 145 U. S., 522, which report, together with the statement contained in the petition for writ of certiorari filed herewith, is, we take it, a sufficient statement of the nature and result of the suit, without again repeating the same.

THE FIRST QUESTION.

Did the said George W. Russ have any interest that could be sold and assigned in the lands surveyed after the first day of November, 1882?

Section 2 of the act of 1879 provides, "that any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which the land is situated."

It will be observed that the contract sued on was made on the first day of November, 1882 (Trans., 11–14), and that after that date ninety-eight sections of the land were surveyed. (Trans., 33.) Now, to constitute a right under the act of 1879, the land must first be surveyed. Without a survey there is no right, and on the first day of November, 1882, the said Russ had acquired no right whatever in said ninety-eight sections other than, or different from, any and every other citizen of the State of Texas. In other words, he had on the first day of November, 1882, no right, title, or interest under or by virtue of any application he had made, and hence could not sell any. Entertaining this view of the law, we requested the said Circuit Court to charge the jury as follows:

"The court instructs the jury that the 'right, title, and interest' of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the 1st day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider or include in the measure of damages." (Trans., 34, 35.)

The learned judge, however, refused to give this charge, but of his own motion instructed the jury "that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right, and one which could lawfully be assigned." (Trans., 34.)

The said Circuit Court of Appeals held that this was no error, therefore the question is, Did the said Russ have any assignable interest in the ninety-eight sections of land surveyed after the 1st day of November, 1882? Did he have an interest that he could sell—that he could transfer and assign?

This question has been answered in the case of White v. Morton, 66 Texas, 340. The opinion upon this question is as follows:

"The first step to be taken under the act (of July 14, 1879) by one desiring to buy was an application to survey the land desired. This application had to be made to the surveyor of the county in which the land was situated. This application conferred on the applicant no absolute right to have a survey made, for it was only when such applications were made by responsible parties that the law made it the duty of the surveyor to make such surveys. Who was to judge whether the applicant was a responsible person? Certainly the surveyor, at least in the first instance, and there were good reasons, when we look to the whole act, why the right to have a survey made was made to depend on the responsibility of the applicant.

"The land embraced in the act was open to pre-emption as well as to sale, and it was the policy of the State not to withdraw the land from appropriation to homestead claims upon the mere application of speculators, who, if a mere application to purchase would operate to withdraw it from such appropriation, might apply for land which they neither intended nor had the ability to purchase; and so, for the purpose of speculating on those who desired to become actual settlers—a class always favored by the laws of this State providing for the disposition of its vacant public domain.

"The act itself indicates a desire to raise money by sale, and if a mere application to purchase could have the effect to withdraw it from sale for any period of time, that purpose could be defeated for a time for speculative purposes by applications made by persons who neither intended nor were able to buy. The whole act shows that an application was not intended to affect the right of the State to sell to any person who might take the steps necessary to buy the land or to grant it to an actual settler.

"The second section of the act provides: 'That any person, firm, or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which the said land is situated.'

"The application evidences a desire to purchase, *i. e.*, to acquire the right to have the land applied for, by further complying with all the terms of the act; but this desire may not be regarded by the surveyor if, in his judgment, the applicant be not a responsible person, and thus the application be ineffective in placing on the surveyor even the duty to survey.

"If the applicant be deemed, or even declared, a responsible person, still the statute does not declare that the application shall operate as a purchase. Until there is a purchase there can be no right which the law recognizes. The application to buy or to have surveyed may be regular, the surveyor satisfied of the responsibility of the applicant and ready to make the survey, but when this point has been reached they have only arrived at that stage of the negotiation and discharge of duty by the surveyor which authorizes him to do the act which the law declares shall operate as a purchase. The surveyor then has the power, but until it is exercised by doing the very act which the law declares shall operate as a purchase, his will, combined with the will of the applicant, can no more operate as a sale or a purchase than can the willingness of an attorney, acting under a power which provides the manner in which it shall be exercised, coupled with the expressed desire of the purchaser to buy at fixed

terms, operate as a sale, until the sale is consummated by the exercise of the power in the mode and manner provided.

"How may the applicant become a purchaser? The statute answers the question. He '*may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed.*' *When this is done as the act contemplates, then, and not before, the State contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed.* When this point was reached there existed an executory contract which gave the purchaser a vested right, on complying with his part of the contract, to have the land purchased, of which subsequent legislation can not deprive him.

"The eighth section of the act provides that 'after the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the lands so surveyed, but such file or location shall be utterly null and void.' Thus is further evidenced the intention of the Legislature, *that no right should be deemed to vest in an applicant prior to a survey, prior to which time it might be appropriated by a preemptor, or by any responsible person, without infringing any vested right of a former applicant.*"

Again, in the case of Jumbo Cattle Company v. Bacon & Graves, 79 Texas, 5, this language is used: "The ruling in White v. Martin, 66 Texas, 340, is decisive of the question. The only difference between that case and the case now before us, is that in the former the purchase money (which was not tendered until after the repealing act took effect) was received by the State Treasurer. In the present case the Treasurer refused the tender. It is too plain for argument that the action of the Treasurer could not affect the rights of the parties. If the purchaser's right to acquire the land was taken away by the repeal of the law which authorized the sale, the Treasurer could not conclude the State. He acted without authority, and his act was void. So if notwithstanding the repeal, the purchaser still had the right to complete his purchase by a compliance with the terms of the law under which his application and *surveys had been made*, the Treasurer could not defeat that right by refusing to receive the money. * * *

"In so far as mere property rights are concerned, we see no difference between the contract of a State and an individual and a contract between two individuals. The formalities by which they are entered into may be different, but the principles affecting the two are essentially the same. When there is an offer made by an act of the Legislature which is accepted by an individual, there is a contract which it is not within the power of the State to impair. After an acceptance a repeal of the law can not affect the contract, but until an acceptance a repeal of the act withdraws the offer, and no contract can be made. By the act of July

14, 1879, the State offered to sell the land to any responsible person who would make application for it and *cause it to be surveyed*. The appellees had accepted the terms by making application and procuring the *surveys* before the act was repealed."

In the former decision by this court (145 U. S., 522) Mr. Justice Field, among other things, said that "it will thus be seen that an applicant under the laws of Texas for the purchase of a portion of its unappropriated lands could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid and the patent of the State was issued to him. If the price was not paid within sixty days after the return to the General Land Office of a map of the land desired and the field notes of its survey, he forfeited all right to the land, and was not thereafter allowed to purchase it. He had, however, the right to complete the purchase and secure a patent within the prescribed period, *after* the map and *field notes* of the survey were filed in the General Land Office, which is designated in the decisions of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation.

Our position before this court and said Circuit Court of Appeals was not the same. Before this court we contended that the said Russ had no right or assignable interest whatever in any of the eighteen hundred and thirteen sections of land, and thus, under the case of Jumbo Cattle Co. v. Bacon and Graves, 79 Texas, 5, this court, without specially noticing the ninety-eight sections surveyed after November 1, 1882, intimated that said Russ had a valuable and assignable right in all the lands.

In said Circuit Court of Appeals, however, our position was quite different; it was that the said Russ only had a valuable interest in the lands surveyed on and prior to the first day of November, 1882, and that he had no interest at all, none which the courts could recognize or enforce, in the ninety-eight sections surveyed after that date; nor do we understand this court as holding otherwise; it could not have done so, because the Supreme Court of Texas, in construing the act of 1879, had expressly held different, and it is our understanding that the Federal courts, in interpreting a statute of a State, always follow the interpretation placed on it by the courts of that State, especially in matters of this kind.

And thus we submit that before a vested right could accrue, the map and field notes had to be filed in the General Land Office within the prescribed time; that before this could be done a survey had to first be made, for without a survey there could be no field notes to file—hence, it will be seen from these decisions:

First—That the desire of the State was to raise money by sale, and that if a mere application to purchase could have the effect to withdraw the land from sale, the purpose of the State could be defeated for a time for speculative purposes.

Second—That the application to have the survey made evidences only a desire to purchase—to acquire the right to purchase, by further complying with the terms of the act.

Third—That until there was *a survey* there could be no right which the law would recognize; no interest that could be transferred or assigned in any manner whatever.

THE SECOND QUESTION.

Did the said George W. Russ lose his right to recover, except as to twenty-four sections, because the field notes of the lands were not returned to and filed in the General Land Office within the time prescribed by law?

Section 3 of the Act of 1879 provided that "it shall be the duty of the surveyor to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases." By reference to section 6 of the Act of 1879, and the amendment thereto of 1881, it will also be observed that no tract of land should contain more than 640 acres. In this case there were 1813 sections of land of 640 acres each, and 1813 sets of field notes. Thus it is seen that each section of land had to be surveyed within three months, and that the field notes of same had to be returned to and filed in the General Land Office within sixty days after such survey—not after the three months, but after the survey had been made. The said Russ made two applications for the survey of 1813 sections of land, which were addressed to and filed by the county surveyor of El Paso county on October 4 and 5, 1882, respectively. The later application only covered sections 1 to 48 inclusive, in block "I," which were surveyed on the 3rd of November, 1882. (Trans., 32–34.) The field notes of these sections were returned to and filed in the General Land Office on the 8th day of January, 1883 (Trans., 32)—*just six days too late.* It will also be noted that *no testimony was offered on the trial of this case as to what lands, if any, the other application included.* (Trans., 32–35.)

All of the 1813 sections were surveyed between the 13th of October, 1882, and the 3rd of November, 1882, except sections 1 to 24, surveyed on November 9, 1882. (Trans., 32–34.) The right to file the field notes of the surveys made on the 13th of October, 1882, expired on the 12th of December, 1882, and the field notes, as a matter of fact, were filed twenty-seven days afterwards, to-wit: January 8, 1883, the date on which all the field notes were filed in the General Land Office. (Trans.,

32.) The field notes of sections 1 to 24, surveyed on the 9th of November, 1882, were filed just in time, and are the only surveys in compliance with the law. In other words, the field notes of all the surveys were filed after the expiration of the sixty days, except as to the twenty-four sections mentioned. Therefore, we requested said Circuit Court to charge the jury as follows:

"You are instructed that the law required the field notes of the land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land." (Trans., 35.)

The court refused to give this charge, and said Circuit Court of Appeals held that it was no error.

It was unquestionably the duty of the said Russ to have had the lands surveyed and the field notes returned to the General Land Office within the time prescribed by law. He undertook to and did return the field notes to the General Land Office, but it was after the time required by law, except as to the twenty-four sections, *and hence every right was lost.*

It is true that section 3 of the act of 1879 required the surveyor to return and file the field notes, but in performing such a duty he represented the person who had made the application and paid him for his services, and nobody else; and it was the applicant's duty to see that the field notes were returned and filed in time, and if they were not, then he should suffer the loss. Section 9 of the act provided that should any applicant fail, refuse, or neglect to pay for the land, he should forfeit all rights thereto and should not thereafter be allowed to purchase the same. Now did this forfeiture and prohibition apply to petitioner? Certainly not, because he was not an applicant; he had not made any application, nor had he caused any lands to be surveyed and the field notes of same returned to the General Land Office. After a forfeiture had been declared, petitioner could have filed on these identical lands and have purchased them. The forfeiture provided in section 9 is reasonable. It is contained in the last section of the act, and was intended to apply only to those persons who had made the application, who had caused the land to be surveyed within ninety days, the field notes of same made out and returned within sixty days, and who then refused to pay for the land.

Now, the question is, who shall bear the loss? Whose fault was it that the field notes were not returned in time? There was ample time to have returned them, and they could have been returned and filed in the General Land Office within sixty days just as easy as afterwards. The question is answered in the case of Warren v. Stoddart, 105 U. S., 224. Mr. Justice Woods speaking for the court in that case, said:

"The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could prevent." Citing Wicker v. Hoppock, 6 Wall., 94; Miller v. Mariner's Church, 7 Me., 51; Russell v. Butterfield, 21 Wend. (N. Y.), 300; United States v. Burnham, 1 Mason, 57; Taylor v. Read, 4 Paige (N. Y.), 561.

THE THIRD QUESTION.

Under the Act of 1879, was a survey not made on the ground, but consisting of office work, void?

The pleadings of petitioner upon this subject were as follows:

"6. This defendant further says that the eighteen hundred and thirteen sections of land mentioned in plaintiff's petition were never actually surveyed on the ground, but the field notes to same were made by and in the office of A. M. Randolph, county surveyor of El Paso county, Texas, and were and are now void and under which plaintiff can claim no right whatever." (Trans., 18.)

The testimony in this case clearly shows that between the 13th of October, 1882, and the 9th of November, 1882, there were 1813 sections of land surveyed, consisting of 1,160,320 acres. (Trans., 33, 34.) It will be noted that there are 640 acres in a section, and that it is four miles around each section. (Trans., 36.) Now, to have surveyed these lands on the ground, the surveyor had to average about 67 sections per day, consisting of 42,880 acres, and travel 268 miles each day. The record shows that on the 13th of October, 1882, there were 76 sections surveyed; on the 16th of October, 1882, 45 sections; on the 18th of October, 1882, 36 sections; on the 21st of October, 1882, 58 sections; on the 22d of October, 1882, 113 sections; on the 23rd of October, 1882, 97 sections; on the 24th of October, 1882, 78 sections; on the 27th of October, 1882, 207 sections; on the 28th of October, 1882, 78 sections; on the 30th of October, 1882, 74 sections; on the 31st of October, 1882, 85 sections; on November 1, 1882, 96 sections, and on November 3, 1882, there were 74 sections surveyed. (Trans., 33.)

F. M. Maddox was the only surveyor who testified in this case. (Trans., 37.) He swore that none of these surveys could have been made by one person on the dates mentioned, and that the average number of miles that a man could survey in one day was ten to fifteen miles. (Trans., 36.) It was proven on the trial of this case that A. M. Randolph, who was the county surveyor of El Paso county in 1882, died four of five years ago. (Trans., 36.)

S. W. S. Duncan, however, testified by deposition for said Russ that, as his agent, he made application and filed on the 1813 sections in this suit; that he made a contract for the defendant in error with the county surveyor of El Paso county for surveying said sections; that there were employed by him in the survey and making the field notes between twenty and thirty people altogether; that he employed the county surveyor and all of his assistants, and himself helped in making the survey, and superintended the matter from making the application to finally turning the field notes over to said Russ to file in the General Land Office; that he knew the survey was made and the field notes returned to the General Land Office, because he superintended the survey and helped to take the field notes to the office, and saw the defendant in error pay the filing fee of one dollar per section; but on cross-examination by petitioner this witness testified that it was impossible for him to state by whom any section of the land had been surveyed. (Trans., 37.) Now, if he had been connected with this matter, as he testified, is it not remarkable that he could not mention the name of some person who had surveyed one of these sections? The truth of the matter is, that none of these lands were surveyed on the ground, and that Randolph would have so testified had he been living. It is impossible for Duncan's testimony to be true, because the Act of 1879 required the surveyor of El Paso county to survey these lands, *and not employes, but himself and nobody else.* The law is as follows:

"Sec. 2. That any person, firm, or corporation desiring to purchase any of the unappropriated public lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof," etc.

Article 3908 of the Revised Statutes (Texas) of 1879, and which has been in force ever since, expressly requires the field notes of every survey, as will hereafter be seen, to be signed by the surveyor making the same, and it was admitted by counsel for said Russ upon the trial of this case, that the 1813 sets of field notes were signed by A. M. Randolph. (Trans., 37.) Thus it is clearly seen that no person except Randolph could have lawfully made these surveys, and it is also seen that it was an utter impossibility for him to have done so, except in the way of office work.

Mr. Maddox also testified that "block J contained twenty-four sections, and could, by making only two corners to each survey, be surveyed by running only fourteen miles, but that twenty-four sections of land

could not be surveyed by running fourteen miles if four corners were made to each section, and if the surveyor only run fourteen miles he would then be calling for corners that he had not made; and on recross-examination the same witness said: "That would be actual surveying on the ground. That is, what is termed actual surveying on the ground is work done on the ground by which you could identify a survey. This work would be that kind." (Trans., 37.)

Now we submit that the latter part of the testimony of Mr. Maddox was simply an opinion, and in which he was mistaken. We have already seen that it is four miles around each section of land, and ninety-six miles round twenty-four sections. To survey twenty-four sections by only running fourteen miles, would not be surveying as much as one line of each section. Such work would not be surveying on the ground—it would not be surveying at all. Surveying only one side of a tract of land would not be a valid survey, nor would the making of only one corner constitute such survey. If a line is not run, how could you have field notes for it? If no corner had been made, how could you call for it? With only one side surveyed and one corner made, how would the field notes close?

But further noticing Duncan's testimony, let us, for argument's sake, admit that there were between twenty and thirty people employed, as stated by him, in surveying these lands; some of them had to be chain carriers, others back and front flagsmen, and could travel no faster than the man that handled the compass.

Mr. Maddox testified "that only one man could handle the compass—do the scientific work—and the assistance of a large number of flagsmen and chain carriers would not aid him in making speed." (Trans., 36.)

Why, the testimony of the said Russ shows that on the 27th day of October, 1882, there were 207 sections surveyed, aggregating 132,480 acres, and covering the vast distance of 828 miles, and we submit that if these twenty or thirty persons had been possessed with wings and had traveled at almost lightning speed, they could not have surveyed these lands on the ground, and hence we asked said Circuit Court to charge the jury as follows:

"If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the ground, then and in such case they are instructed that such surveys are void, and for such sections plaintiff can not recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant;" but the court refused to give this charge (Trans., 38), and said Circuit Court of Appeals held it was no error.

The case of Bacon et al. v. The State, 21 S. W. Rep., 149, is decisive

of this question. In that case the Court of Civil Appeals of Texas said: "The subject matter of this controversy is 466 sections, or 298,246 acres of land, situated in Scurry, Borden, and adjoining counties. In 1873 the Houston and Texas Central Railway Company, for the purpose of locating its land certificates thereon, had a large amount of surveying done in Scurry, Borden, Howard, Kent and Fisher counties. This surveying was done by dividing large blocks of land into sections containing 640 acres each, as will be seen by reference to our conclusions of fact, and was done upon the ground in such a way as might be regarded as work in the field. The surveying so done by said railway company embraced all of the land in controversy in this suit, but its right thereto failed by reason of the land at that time being within what is known as the 'Texas and Pacific Railway reservation.'

"On December 1, 1882, E. M. Bacon and E. C. Graves made application to the proper surveyor to survey for them a large part of this Houston and Texas Central Railway Company land, embracing that in controversy in this suit, which they desired to purchase under the act of July 14, 1879, amended March 11, 1881, which was generally known as the 'fifty-cent act.' The surveyor, instead of doing this work upon the ground, simply adopted the work which had previously been done by the railway company, and copied their field notes from the records in his office, and the field notes so obtained were returned by Bacon and Graves as to the land in controversy to the General Land Office within the time required by the law above cited. Bacon and Graves, at the time they returned the field notes, knew how the surveyor had obtained them, and that none of the work had been done in the field. The deputies of the surveyor, however, who appeared from the certificates to the field notes to have done this work, had previously been upon the ground in making other surveys, and had seen enough of the railroad work to satisfy them of its correctness.

"The act under which Bacon and Graves were attempting to acquire this land provides that 'any person, firm, or corporation desiring to purchase any of the unappropriated land herein set apart and reserved for sale may do so by causing the tract or tracts which said person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated;' and the question as to whether or not the obtaining of the field notes in the manner above set forth should be considered as their having had the land surveyed, within the meaning of this act, constitutes the most important question for our decision in this case.

"Prior to the adoption of our Revised Statutes, in prescribing the manner in which the surveys were to be made, our law provides that 'The courses of the lines shall be determined by the magnetic needle,

and care shall be taken to determine its variation from the pole in the district where the surveys are made. The surveys shall be made with great caution, with metalic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearings and distances of two permanent objects at least.' Under this law, at an early day the practice became so common among surveyors to disregard its provisions by making out field notes in their offices from data obtained otherwise than by work done on the ground, that the courts, in a great number of cases, have felt constrained to hold that where the question was raised by subsequent locators, or third parties adversely interested, such acts on the part of the surveyor would constitute a valid appropriation of the land as against such claims. Horton v. Pace, 9 Texas, 84; Jenkins v. Chambers, Id., 231; Jones v. Burgett, 46 Texas, 293; Stiles v. Gray, 10 Texas, 506. And in Thompson v. Railway Co., 68 Texas, 392 (4 S. W. Rep., 629), strong language is used recognizing the adoption of field notes previously surveyed as being a legal survey within the spirit of our law as it stood previous to the adoption of our Revised Statutes. At the same time it is not to be denied, that to constitute a survey strictly within the terms of our law as it has always been, it would be necessary for the work to be done upon the ground in the manner prescribed by the statute. In Stafford v. King, 30 Texas, 269, it is said: 'It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, to see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract, and to extend a correct description of these objects, natural and artificial, with courses and distances, into the field notes of the survey, in order that they may be inserted in the patent, which will afford the owner, as well as other persons, the means of identifying the land that was in fact located and surveyed for the owner.' And in Sanborn v. Gunter (Texas Sup.) 17 S. W. Rep., 121, it is said: 'Actual surveys, by which lands granted by the State shall be specially described and distinguished, have always been contemplated and prescribed by law. It is true that, under the laws in force when the surveys in controversy were made for the railway company, it was not always regarded as indispensable, however desirable, that the line of the survey should be actually run and measured on the ground. Recognizing the great inaccuracies that had frequently resulted from the practices of the different surveyors in attempting to make out field notes in their offices without surveying the land upon the ground, our Legislature, in adopting the Revised Statutes, inserted this provision (article 3908): 'The field notes of each survey shall state: (1) The county or district in which the land is situated. (2) The certificate or other authority under or by virtue of which it is made,

giving a true description of same by numbers, date, when and where issued, name of original grantee, and quantity. (3) The land by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas). (4) A diagram of the survey. (5) The variation in which the running was made. (6) It shall show the names of the chain carriers. (7) It shall be dated and signed by the surveyor. (8) The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page. (9) When the survey has been made by a deputy, the county or district surveyor should certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record.'

"We think the principal object of the Legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected as above indicated, and we think it must be conceded if the Legislature has the power to condemn what is commonly known as an 'office survey,' or 'office work,' and to require its officers, before parting with the public land of the State, to have the surveying actually done in the field, it has done so by the passage of this statute. We know of no case in which the question has been raised as to the validity of an office survey or the adoption of previous field notes for a survey which should have been made in the field since the adoption of our Revised Statutes; but our Supreme Court, in several cases, has given strong intimations that its ruling under the previous laws would not apply to such surveys.

* * * * * * * * * *

"Had an individual owned this large body of land, and had published and offered to sell to any person 640 acres, who would have it surveyed by the authorized public surveyor of the county in which the land was situated, and that such surveyor must certify that the work was actually done in the field, we think it would hardly be contended that the proposed purchaser could file his petition against the owner, setting up that the surveyor had copied some field notes for him from work which had been done by some other surveyor years before, and that, by reason of the field notes thus obtained, he had a right to compel the owner to accept such field notes as a compliance with his offer, and to execute a deed for the land embraced therein; and we see no reason why a different rule should be applied to the State than that applied to an individual, under similar circumstances."

The Supreme Court of Texas denied a writ of error in the case of Bacon et al v. The State, thereby sustaining the opinion of the Court of Civil Appeals and holding that the field notes were void.

And hence we submit that if the surveys were not made on the ground, they were void, and being void, the matter stood as if no survey had been made at all. Without a valid survey, as already seen, there was no right, title, or interest which the law could recognize.

J. L. PEELER,
Counsel for Petitioner.

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No. 813

In Supreme Court of the United States.

OCTOBER TERM, 1894.

COUNT JOSEPH TELFENER, PETITIONER,

vs.

GEORGE W. RUSS.

Opposition on part of George W. Russ to the Application of Count Joseph Telfener for a writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit, to Certify to the Supreme Court, for its Review and Determination, the Case of Count Joseph Telfener, Plaintiff in Error vs. George W. Russ, Defendant in Error.

S. R. FISHER,
Counsel for George W. Russ.

FRANZ FISET,
C. H. MILLER,
HANCOCK & SHELLEY,
of Counsel.

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In Supreme Court of the United States.

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vs.

GEORGE W. RUSS.

Opposition on part of George W. Russ to the Application of Count Joseph Telfener for a writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit, to Certify to the Supreme Court, for its Review and Determination, the Case of Count Joseph Telfener, Plaintiff in Error vs. George W. Russ, Defendant in Error.

George W. Russ, Defendant in Error, in the case of Count Joseph Telfener, Plaintiff in Error, in the United States Circuit Court of Appeals for the Fifth Circuit, for the purpose of opposing the application for *certiorari*, desires to preface his specific objections by such excerpts from the record, amendatory of and supplemental to Petitioner's statements, as will fully develop the contention, that the motion should be denied.

Jurisdiction in this case was acquired by the United States Court by reason of the fact alone that the opposite parties to the suit were an alien and a citizen of the United States: George W. Russ being a citizen of the United States, and Count Joseph Telfener, a subject of the king of Italy.

The said parties, on November 1, 1882, entered into a coutract by which the said Russ agreed to sell, transfer and assign, on November 15, 1882, to said Telfener, for a money consideration of 25 cents per acre, all that right, title and interest in and to about one million acres of land, for the purchase of which, from the State of Texas, said Russ had theretofore made application

under and by virtue of a law of the State of Texas, of date July 14, 1879, which (omitting in section 1, the enumeration of the counties to which it applied), reads as follows:

SECTION 1. Be it enacted by the Legislature of the State of Texas, That all the vacant and unappropriated land situated in the following named counties, viz: * * * be and the same is hereby appropriated and set apart for sale, together with all the unappropriated lands situated and, being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public lands, situated in organized counties of this State, as contain not more than six hundred and forty acres: provided, that the three million and fifty thousand acres, heretofore appropriated for the building of a State capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act all legal surveyors' fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map and field notes of the land desired to be purchased, it shall be the right of

the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the State treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation, a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream or permanent water than one vara per acre for each survey of three hundred and twenty acres or less, and three-fourths of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to surveyors in relation to the surveying of public lands, under the provisions of this act, as may best subserve the interest of the State, and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same at the rate of fifty cents per acre, within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm or corporation, who shall pay into the treasury the purchase money therefor.

SEC. 10. One-half of the net proceeds of sales under the provisions of this act shall be and are hereby set apart for the benefit of the public free schools of this State, and the comptroller of public accounts shall, under and by direction of the governor, invest the same in interest bearing bonds of the State of Texas, or, if said bonds are not to be obtained, then in interest bearing bonds of the United States, the interest therefrom to be paid

into the treasury as part of the available school fund. The balance of the net proceeds of sales under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the State of Texas as the same becomes due and payable. No surveys shall be made in any of the counties set aside for the State capitol, and in which said lands may be selected until after the surveys of the three million and fifty thousand acres set aside for the construction of a new State capitol have been surveyed.

SEC. 11. Whereas, the close of the present session of the legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and whereas the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

On the eleventh day of March, 1881, this law was amended by extending its scope over some additional counties, and also over what is known as the Pacific reservation, within which is located the land hereinafter spoken of.

On the twenty-second day of January, 1883, both the original act and the amendment were repealed.

The contract entered into between said parties on said first day of November, 1882, reads as follows:

The State of Texas, }
County of Dallas. } ss.

This contract and agreement, entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows:

Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas, under and by virtue of an act of the legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and

duly filed in the surveyor's office of El Paso county, at Ysleta; and whereas, the said Count Telfener is desirous of purchasing from said Russ all his rights, titles and interest under and by reason of said application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of said lands from the State of Texas; and in such case has agreed and promised to pay said Russ, as consideration of his sale, transfer and assignment of all his said rights, titles and interest, 25 cents per acre for each and every acre of land covered by said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer and assign unto the said Count Telfener all his rights, titles and interest in said lands acquired by his said application and files. In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly and properly made as aforesaid and according to the provisions of said law, and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said surveyor's office and in the office of the Commissioner of the General Land Office of the State at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertainsd by approximation, in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, 90 per centum of the said purchase price so agreed upon as aforesaid for the number of

acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring and assigning unto the said Count Telfener all and singular the rights, titles and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same, or any part thereof, by, through or under him. It is understood, however, that the said inspection, ascertainment of regularity of files and of the amount of land by approximation, shall be completed on or before the fifteenth day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

After the transfer and assignment as aforesaid shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted and the field notes thereof returned and filed according to the provisions of said law.

Upon the completion of said surveys and field notes, the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of 25 cents per acre for each and every acre of said land, the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

Witness our hands, this first day of November, 1882.

GEO. W. RUSS,
J. TELFENER,
By C. BACCARISSE, Ag't.

Witness:

CHAS. FRED. TUCKER,
WM. MCGRAIN.

The land spoken of in the contract was subject to the application of Russ for its purchase under said law of 1879, as amended in 1881.

The application embraced 1813 sections of 640 acres each, all of which were surveyed before November 1, 1882, excepting 98, which were surveyed between said date and November 9, 1882. All the field notes were returned to and filed in the General Land Office of Texas on January 8, 1883.

The said Telfener did not comply with his part of the said undertaking, but on the fifteenth day of November, 1882, wholly made default, and the said Russ, who was ever ready, able and willing to perform, thereupon instituted suit for the breach of said contract. Trial was had in the United States Circuit Court for the Fifth Circuit and Western District of Texas, at Austin, and judgment was rendered in favor of said Russ on July 11, 1893, for the sum of $518,440.50. A motion for a new trial having been overruled, the said Telfener removed the case by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, where same was docketed as No. 183, under the style of Count Joseph Telfener, Plaintiff in Error, vs. George W. Russ, Defendant in Error. Upon the hearing the said court affirmed the judgment of the court below, on the sixth day of February, 1894. Petition for rehearing was duly filed and overruled on the twenty-ninth day of May, 1894.

Applicant complains of the ruling of the Circuit Court of Appeals in regard to three points, which are substantially covered by assignments of error contained in the record:

First. Complaint is made regarding the ruling of said court on the following, third assignment of error:

The court erred in refusing to give to the jury defendant's special charge number thirteen, which is as follows:

The court instructs the jury that the "right, title and interest" of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the first day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and such sections of land surveyed after said November first, 1882, you will not consider or include in the measure of damages.

Second. The correctness of the ruling on the fourth assignment of error is questioned, it reads as follows:

The court erred in refusing to give to the jury defendant's special charge number fourteen, which is as follows:

"You are instructed that the law required the field notes of the land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days, therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land."

Third. The applicant attacks the ruling of the said court in regard to the fifth assignment of error, which reads as follows:

The court erred in refusing to give to the jury the defendant's special charge number sixteen, which is as follows:

"If the jury find from the evidence that any of the sections of land described in plaintiff's petition, were not actually surveyed on the ground then and in such case they are instructed that such surveys are void, and for such sections plaintiff can not recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant."

All of said assignments were properly submitted to said court and the ruling in regard to the first point, or third assignment, was, as is shown by the opinion of the court as follows:

"The evidence relating to this matter shows that the plaintiff had made application in two instruments of writing for the survey of 1813 sections of land described in his petition, which was addressed to, and the application filed by, the county surveyor of El Paso county, on October 4th and 5th, 1882, respectively. It shows also, that the surveys of said land, for which said Russ had made application, were made at and prior to the time of the execution of the contract sued on, saving and excepting 98 sections of 640 acres each, surveys of which were made between November 1 and November 9, 1882. These surveys were filed in the General Land Office on the eighth day of January, 1883. The instrument executed between the plaintiff and the defendant, November 1, 1882, was an executory contract by which the plaintiff, for and in consideration of a sum of money promised to be paid by the defendant, agreed on the fifteenth day of November, 1882, to transfer and assign to defendant all his right,

title and interest in and to the land in question, acquired by virtue of plaintiff's application. This contract was a valid and binding contract at the time it was entered into, unless it was prohibited by law or public policy, which is not contended.

"Under this state of the law and of the evidence, the instruction asked for did not present the law of the case, and if technically correct as a general proposition was calculated to mislead, and was therefore properly refused. The actual charge of the court given in this regard is as follows: 'You are further instructed that the right to purchase the lands mentioned which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right, and one which could be lawfully assigned;' and it seems to have correctly presented the law of the case."

The second and third points relied on by applicant and embodied in the fourth and fifth assignments of error were considered together, and the court's opinion in regard thereto is as follows:

"In the view that we take of the case, it is wholly immaterial whether the surveys made under the application of the plaintiff and returned to the General Land Office, were made and returned within sixty days after the date of the survey, or were returned at all; and also, whether the surveys made under the said application were actually made on the ground or were office surveys.

"With regard to the return of the surveys to the General Land Office with the field notes within sixty days after the date of the survey, a reference to the law will show that the duty of making such return devolved not upon the applicant, but upon the surveyor, and that the failure to make such return within the time on the part of the surveyor is not a reason for forfeiture under the terms of the act.

"The ninth section of the act is the only section of the same which provides for the forfeiture of the rights secured by the application, and that provision is, that should any applicant for the purchase of public land fail, refuse or neglect to pay for the same at the rate of fifty cents per acre, within the time prescribed in section 5 of the act, he shall forfeit all rights thereto, and he shall not be allowed thereafter to purchase the same. But be this as it may, the contract sued on is an agreement to

transfer from Russ to Telfener all and singular the rights, title and interest that the said Russ now has or may be entitled to in and to said lands, by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that if such actual surveys had been made, he (Russ) would cause them to be returned and filed in the General Land Office at any time or in any manner whatever. The contract made the same day between the same parties, provided that Russ, at his own proper cost and expense, should make all the surveys, field notes, and maps of the said lands and file them in the office of the surveyor of El Paso county, and in the General Land Office of the city of Austin, Texas, in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made under the contract first mentioned, at the time agreed on, to-wit, November 15, 1882.

"As it is conceded that Telfener made default under the first mentioned contract on the fifteenth of November, 1882, and that the sale and transfer under said contract was never carried out, the second mentioned contract became wholly inoperative and irrelevant; and the rights of the plaintiff became fixed, definite and certain on the fifteenth of November, 1882, at the time Defendant Telfener made default. Under these circumstances, we fail to perceive any obligation resting upon Russ to either complete the surveys or file the same in the General Land Office. Whatever was done by Russ after the fifteenth of November to perfect the surveys and file the same, was done at his own cost, and at his own risk, and could in nowise affect the plaintiff in error, Telfener, because the rule for damages in the case was, as declared by the Supreme Court in Telfener v. Russ, supra, as follows:

" 'On the fifteenth of November he (Russ) possessed all the right to the land which he ever possessed; and assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale.' "

Said Circuit Court of Appeals was unanimous in the disposition of this case, did not certify any of the said questions to the Supreme Court, and no order was entered staying the mandate for the purpose of enabling the applicant to apply for the writ of certiorari.

These being substantially the matters of the record on which the application is based, it is respectfully submitted that it should be denied.

In this behalf it is conceived, and therefore respectfully suggested, at the outset, that, by reason of the fact that no stay of the mandate was entered or applied for in the Circuit Court of Appeals giving notice thereby that the finality of the judgment would be tested by recourse to the reserve power lodged by the law of 1891 in the discretion of this court, the said judgment of the Circuit Court had, *ex ipsa vi legis*, become final, and will, therefore, if for no other reason, not be reviewed. Were it held otherwise, there would be no certainty, in any case, in the absence of a rule of court or statutory provision, as to when the judgment or decree of the Circuit Court of Appeals, made final by the law, would be so in fact, unless an application for certiorari has been made and acted upon.

For reasons why this application, if it be considered, should be denied, the said George W. Russ respectfully represents to the court:

None of the questions involved in the three points, on the strength of which the interposition of this court by a writ of certiorari is sought, are of such a character as to bring the case within any of the classes of causes over which the court, according to its own precedent, has felt called upon to exercise, or over which it has announced that it will or may exercise the discretionary power of review by certiorari, granted by section 6, of the act of March 3, 1891.

A.

1. The first point relied on by applicant presents two questions:

a. Whether or not, Russ, under his application for the purchase of 1813 sections, all but 98 of which had, under it, been surveyed before November 1, 1882, had a valuable right, some-

thing of value, which would support the executory contract of that date, so far as the 98 sections were concerned.

b. That the ruling of the court that Russ had a *valuable right* in said 98 sections, is opposed to the decision by the Supreme Court of Texas in White v. Martin, 66 Texas, 344, to the effect that no *right* should be deemed *vested* in an applicant prior to a survey.

2. The second point raises the question whether or not the field notes to the 1813 sections, or some portions thereof, were filed within time, according to the requirements of the statute of 1879.

3. The third point suggests the questions:

a. Of the legality or illegality of the field notes filed in the General Land Office in January, 1883.

b. That in holding that it was immaterial whether the surveys were made on the ground or consisted of office work, the Circuit Court of Appeals disregarded the decision of the State court in the case of Bacon et al. v. State, 21 S. W., 149.

Thus it appears, the questions relied on, neither on their face, nor in their potentiality—even if the widest imaginable scope be accorded them—present matters of gravity or general importance such as this court requires as a pre-requisite for the issuance of the writ under its decisions in Lau Ow Bew v. U. S., 141 U. S. p. 583, and In Re Woods, 143 U. S., p. 202.

B.

1. The contention, (above noticed under A 1 b.) contained in Appellant's first point: That the ruling of the court that Russ had a valuable right in the 98 sections (not yet surveyed when the executory contract was entered into) is opposed to the decision by the Supreme Court of Texas in White v. Martin, 66 Texas, 344, to the effect that no right should be deemed vested in an applicant prior to a survey, is, we submit, not well founded.

The case relied on decides: That the repeal of the law of 1879 did not affect parties who had made their applications and had the survey thereunder made as required while this law was in force. That the applicant's right to the land, to the legal title, had by survey under the application become *vested*, and this

right could not then be taken away by the repeal of the law (White v. Martin, 66 Texas, 344.)

The question in the case at bar, and decided by the Circuit Court of Appeals in the affirmative, was: after Russ had made and the surveyor had filed a proper and legal application for 1813 sections, all of which, excepting 98, were, by virtue of such application surveyed, prior to November 1, 1882, was his right on said first of November, *a valuable one*, and therefore (barring inhibition by the Statute, which is not claimed), the legitimate subject matter of a contract and assignable?

The points decided by the State Court and the Circuit Court of Appeals, respectively, differ, we maintain, radically.

2. The record of the case does not bear out the apparent contention in applicant's third question (A, 3, b), that the State Court has ruled differently on the question of illegality of surveys from what the decision was in the Circuit Court of Appeals.

The Circuit Court of Appeals did not pass on the legality of the surveys at all. See opinion of court, *supra*, under second and third points raised by applicant.

While the questions regarding contrariety of decisions are practically the same as those raised In Re Woods, *supra*, where the application for certiorari was denied, yet, it appears from the above that in the case at bar such questions do not even fairly arise.

ARGUMENT.

This court has, in general language, outlined what character of questions and cases, in the proper instances, will be reviewed, in the exercise by the court of the discretion vested in it to grant the writ of certiorari. In Re Woods, Petitioner, 143 U. S., the court, in adopting the language of the "eminent jurist and statesman" who had charge of the bill of March 3, 1891, stated that, in the interest of jurisprudence and uniformity of decision, provision was made for such supervision on part of the Supreme Court as would tend to avert diversity of judgment and guard against inadvertence of conclusions in controversies involving weighty and serious matters. Again, in American Construction Company v. Jacksonville Railway, 148 U. S., 383, the

court reiterated, that the authority to issue a writ of certiorari under section 6 of the law of 1891, "should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision," and, that while many applications have been made to the Supreme Court for writs of certiorari to the Circut Court of Appeals under that provision, two only have been granted: the one in Lau Ow Bew case, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, petitioner, an admiralty case which presented an important question as to the rules of navigation, and in this last case the decree of the Circuit Court of Appeals reversed the decree of the district judge and was dissented from by one of three circuit judges. In both cases the Circuit Court of Appeals had declined to certify the question to the Supreme Court.

This court then grants applications for a writ of certiorari, made under the law of 1891, only in cases of gravity and general importance. When questions are involved which, in their solution, call into action the highest functions of this court; and while such questions were clearly involved in the cases in which the writ was granted, yet, it does not appear that even in those cases it would have been allowed if the attitude of the trial and appellate judges had not been taken into consideration. The case at bar, shows that the trial judge, in his view of the case, was in full accord with the judges of the Circuit Court of Appeals; they deliberately and unanimously approved his view of the law of the case. From the application, considered at the hands of the record, it appears that the only questions involved are whether or not a fractional part of what constituted the consideration in a private contract between two individuals was valuable. The ulterior point, whether the liability of Telfener under the contract was fixed by his breach on November 15, or whether the acts done thereafter by Russ were to be taken into consideration, is not even an open question; as we take it, that this was settled by this court in a former decision of this case reported in 145 U. S., 522.

The contention that the Circuit Court in its ruling did not follow the State decisions, is not sustained by the record; and, even

if it were, this court, following its decision In Re Woods, 143 U. S., 292, would not consider it in passing on the merits of this proceeding.

The questions arising on the application for certiorari are so palpably trifling, untenable and devoid of general importance that they cannot be considered by this court.

We respectfully submit that the motion should be denied.

S. R. FISHER,
Counsel for George W. Russ.

FRANZ FISET,
C. H. MILLER,
HANCOCK & SHELLEY,
of Counsel.

Office Supreme Court, U. S.
FILED.
FEB 21 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 813.

COUNT JOSEPH TELFENER, Plaintiff in Error,

vs.

GEORGE W. RUSS.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. L. PEELER, of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

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COUNT JOSEPH TELFENER, Plaintiff in Error,

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GEORGE W. RUSS.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of the Nature and Result of the Case.

On the 14, July, 1879, the Legislature of Texas passed a law entitled: "An act to provide for the sale of a portion of the unappropriated public lands," etc. The sections bearing on the questions involved are—

"SEC. 2. That any person, firm or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"SEC. 3. It shall be the duty of the surveyor to whom application is made by responsible parties to survey the lands designated in said application within three months from the date thereof, and, within sixty days after said survey, to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

"SEC. 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map, and field notes of the

land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed, to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to such person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for.

"SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six hundred and forty acres, and no tract shall have a greater frontage on any running stream, or permanent water, than one vara per acre for each survey of three hundred and twenty acres or less, and three-fourths of one vara per acre for all other surveys.

"SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

"SEC. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm, or corporation who shall pay into the treasury the purchase money therefor."

This act was amended on March 11, 1881, by extending its provisions to other counties, and making section 6 read as follows:

"SEC. 6. These lands shall be sold in tracts of 640 acres each, unless precluded by previous surveys, in which event the purchaser must include all the vacancy, and no tract shall have a greater frontage on any navigable stream or permanent water than one-half the square of such survey, excepting where surrounded by older surveys."

On January 22, 1883, both acts were repealed, but while they were in force, it is claimed by said George W. Russ that he entered into a contract with plaintiff in error on the 1, November, 1882, not personally, but with an agent, by which he sold and plaintiff in error purchased the right said Russ claimed to have in about one million acres of land, agreeing to pay therefor twenty-five cents an acre.

The contract claimed, briefly stated, is as follows:

"Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas; from the State of Texas, under and by virtue of an act of the Legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at fifty cents per acre, said

application having been made in October, 1882, and duly filed in the surveyor's office in El Paso county; and

"Whereas, said Count Telfener is desirous of purchasing from the said Russ all his rights, title and interest under and by reason of said application.

"In consideration of the transfer of all such rights as the said Russ had by reason of such application, plaintiff in error agreed to give him twenty-five cents per acre for each and every acre of land covered by his said application."

It was provided in the contract that ninety per cent of the said twenty-five cents should be paid (the application having been found to be good and regular) on the 15, said November, and that thereupon said Russ would execute and deliver to plaintiff in error any and all deed or deeds or other instruments that might be proper or necessary to convey, transfer, or assign to him all and singular the rights, title, and interest that he, the said Russ, then had or might be entitled to in and to said lands by reason of such application and files, and that on the completion of the surveys and field notes the residue should be paid.

On the 16, June, 1883, said Russ instituted suit on said contract to recover said twenty-five cents per acre, alleging that he complied with said contract, but that plaintiff in error failed in every particular.

Plaintiff in error filed his answer, consisting of demurrers, general denial, specially alleging that C. Baccarisse had no authority to make such contract, and that said land was not actually surveyed on the ground, and hence the field notes to same were void.

The case was tried in the Circuit Court of the United States for the Western District of Texas, at Austin, and a judgment rendered in favor of said Russ, a citizen of Texas, against plaintiff in error, a resident of Rome, Italy, on the 11, July, 1893, for the sum of $518,440.50. Whereupon plaintiff in error duly removed said cause to the United States Circuit Court of Appeals for the Fifth Circuit, which was affirmed by said court on 6, February, 1894.

Plaintiff in error, in due time, filed a petition for rehearing in said Circuit Court of Appeals, which was overruled on the 29, May, 1894, and the case removed to this court on petition of plaintiff in error for writ of certiorari, October 19, 1894.

This cause has been once before this honorable court, and is reported in 145 U. S., 522, but the report does not contain a full statement of the pleadings and questions now presented.

Plaintiff in error submits that there was error, and manifest error, in the holdings and rulings of said Circuit Court of Appeals, in this:

1. The undisputed evidence shows that said contract was made on 1, November, 1882; that after such date the said Russ caused ninety-eight

sections of said land to be surveyed, and that, notwithstanding these facts, said Circuit Court of Appeals held that said Russ had a valuable and assignable right on 1, November, 1882, in and to said ninety-eight sections of land.

2. Section 3, Act 1879, required all field notes to be returned to and filed in the General Land Office within sixty days after the survey; the testimony clearly established the fact that out of 1813 sections of land surveyed, only the field notes to twenty-four sections were returned and filed in time; yet said Circuit Court of Appeals held that it was wholly immaterial whether the surveys under the applications of said Russ were made and returned within sixty days, or were returned at all.

3. The testimony contained in the record of this cause furthur disclosed that said land was not surveyed on the ground, but that the field notes to same must have consisted of office work; that although the Court of Civil Appeals of Texas in the case of Bacon et al. v. State, 21 S. W. Rep., 149, decided that such surveys were void, the said Circuit Court of Appeals held that it was immaterial whether the surveys were actually made on the ground or consisted of office work.

All three of the above questions were presented to said Circuit Court and Circuit Court of Appeals, and were by said courts decided in favor of said Russ.

FIRST QUESTION.

Did the said George W. Russ have any interest that could be sold and assigned in the lands surveyed after the first day of November, 1882?

Section 2 of the act of 1879 provides, "that any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which the land is situated."

It will be observed that the contract sued on was made on November 1, 1882 (Trans. 9–10), and that after that date ninety-eight sections of the land were surveyed. (Trans., 30.) Now, to constitute a right under the act of 1879, the land must first be surveyed. Without a survey there is no right, and on the first day of November, 1882, the said Russ had acquired no right whatever in said ninety-eight sections other than, or different from, any and every other citizen of the State of Texas. His interest consisted simply of a piece of moonshine. He had on November 1, 1882, no right, title, or interest under or by virtue of any application he had made, hence could not sell any; and entertaining this

view of the law, we requested said Circuit Court to charge the jury as follows:

"The court instructs the jury that the 'right, title, and interest' of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the first day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider or include in the measure of damages." (Trans., 31.)

The learned judge, however, refused to give this charge, but of his own motion instructed the jury "that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right, and one which could lawfully be assigned." (Trans., 31.)

The said Circuit Court of Appeals held that this was no error, therefore the question is, Did the said Russ have any assignable interest in the ninety-eight sections of land surveyed after November 1, 1882? Did he have an interest that he could sell—that he could transfer or assign?

This question has been answered in the case of White v. Morton, 66 Texas, 340. The opinion upon this question is as follows:

"The first step to be taken under the act (of July 14, 1879) by one desiring to buy was an application to survey the land desired. This application had to be made to the surveyor of the county in which the land was situated. This application conferred on the applicant no absolute right to have a survey made, for it was only when such applications were made by responsible parties that the law made it the duty of the surveyor to make such surveys. Who was to judge whether the applicant was a responsible person? Certainly the surveyor, at least in the first instance, and there were good reasons, when we look to the whole act, why the right to have a survey made was made to depend on the responsibility of the applicant.

"The land embraced in the act was open to pre-emption as well as to sale, and it was the policy of the State not to withdraw the land from appropriation to homestead claims upon the mere application of speculators, who, if a mere application to purchase would operate to withdraw it from such appropriation, might apply for land which they neither intended nor had the ability to purchase; and so, for the purpose of speculating on those who desired to become actual settlers—a class always favored by the laws of this State providing for the disposition of its vacant public domain.

"The act itself indicates a desire to raise money by sale, and if a mere application to purchase could have the effect to withdraw it from sale for

any period of time, that purpose could be defeated for a time for speculative purposes by applications made by persons who neither intended nor were able to buy. The whole act shows that an application was not intended to affect the right of the State to sell to any person who might take the steps necessary to buy the land or to grant it to an actual settler.

"The second section of the act provides: 'That any person, firm, or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which the said land is situated.'

"The application evidences a desire to purchase, *i. e.*, to acquire the right to have the land applied for, by further complying with all the terms of the act; but this desire may not be regarded by the surveyor if, in his judgment, the applicant be not a responsible person, and thus the application be ineffective in placing on the surveyor even the duty to survey.

"If the applicant be deemed, or even declared, a responsible person, still the statute does not declare that the application shall operate as a purchase. Until there is a purchase there can be no right which the law recognizes. The application to buy or to have surveyed may be regular, the surveyor satisfied of the responsibility of the applicant and ready to make the survey, but when this point has been reached they have only arrived at that stage of the negotiation and discharge of duty by the surveyor which authorizes him to do the act which the law declares shall operate as a purchase. The surveyor then has the power, but until it is exercised by doing the very act which the law declares shall operate as a purchase, his will, combined with the will of the applicant, can no more operate as a sale or a purchase than can the willingness of an attorney, acting under a power which provides the manner in which it shall be exercised, coupled with the expressed desire of the purchaser to buy at fixed terms, operate as a sale, until the sale is consummated by the exercise of the power in the mode and manner provided.

"How may the applicant become a purchaser? The statute answers the question. He '*may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed.*' *When this is done as the act contemplates, then, and not before, the State contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed.* When this point was reached there existed an executory contract which gave the purchaser a vested right, on complying with his part of the contract, to have the land purchased, of which subsequent legislation can not deprive him.

"The eighth section of the act provides that 'after the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the lands so surveyed, but such file or location shall be utterly null and void.' Thus is further evidenced the intention of the Legislature, *that no right should be deemed to vest in an applicant prior to a survey, prior to which time it might be appropriated by a preemptor, or by any responsible person, without infringing any vested right of a former applicant.*"

Again, in the case of Jumbo Cattle Company v. Bacon & Graves, 79 Texas, 5, this language is used: "The ruling in White v. Martin, 66 Texas, 340, is decisive of the question. The only difference between that case and the case now before us, is that in the former the purchase money (which was not tendered until after the repealing act took effect) was received by the State Treasurer. In the present case the Treasurer refused the tender. It is too plain for argument that the action of the Treasurer could not affect the rights of the parties. If the purchaser's right to acquire the land was taken away by the repeal of the law which authorized the sale, the Treasurer could not conclude the State. He acted without authority, and his act was void. So if, notwithstanding the repeal, the purchaser still had the right to complete his purchase by a compliance with the terms of the law under which his application and *surveys had been made*, the Treasurer could not defeat that right by refusing to receive the money. * * *

"In so far as mere property rights are concerned, we see no difference between the contract of a State and an individual and a contract between two individuals. The formalities by which they are entered into may be different, but the principles affecting the two are essentially the same. When there is an offer made by an act of the Legislature which is accepted by an individual, there is a contract which it is not within the power of the State to impair. After an acceptance a repeal of the law can not affect the contract, but until an acceptance a repeal of the act withdraws the offer, and no contract can be made. By the act of July 14, 1879, the State offered to sell the land to any responsible person who would make application for it and *cause it to be surveyed.* The appellees had accepted the terms by making application and procuring the *surveys* before the act was repealed."

In the former opinion of this court (145 U. S., 522) Mr. Justice Field, among other things, said that "it will thus be seen that an applicant under the laws of Texas for the purchase of a portion of its unappropriated lands could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid and the patent of the State was issued to him. If the price was not paid within sixty days after the return to the General Land Office of a map of the

land desired and the field notes of its survey, he forfeited all right to the land, and was not thereafter allowed to purchase it. He had, however, the right to complete the purchase and secure a patent within the prescribed period, *after* the *map* and *field notes* of the survey were filed in the General Land Office, which is designated in the decisions of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation."

The positions we took before this court on the former writ of error and said Circuit Court of Appeals were not the same. Before this court we contended that said Russ had no right or assignable interest whatever in any of the eighteen hundred and thirteen sections of land, and thus, under the case of Jumbo Cattle Co. v. Bacon & Graves, 79 Texas, 5, this court, without specially noticing the ninety-eight sections surveyed after November 1, 1882, intimated that said Russ had a valuable and assignable right in all the lands.

In said Circuit Court of Appeals, however, our position was quite different; it was that the said Russ only had a valuable interest in the lands surveyed on and prior to November 1, 1882, and that he had no interest at all, none which the courts could recognize or enforce, in the ninety-eight sections surveyed after that date; nor do we understand this court as holding otherwise; it could not have done so, because the Supreme Court of Texas, in construing the act of 1879, had expressly held different, and it is our understanding that the Federal courts, in interpreting a statute of a State, always follow the interpretation placed on it by the courts of that State, especially in matters of this kind.

And thus we submit that until there was a *survey* there could be no right which the law could recognize; no interest that could be transferred or assigned in any manner whatever.

But we shall now go further, and insist on this honorable court not only holding the interest of George W. Russ in said ninety-eight sections absolutely worthless and untransferable, but that he had no salable right in any of the other sections, because on November 1, and 15, 1882, the *dates of the making and breach of the alleged contract*, he had not filed in the General Land Office the map and field notes to any of the surveys, and until he had done so what right did he have? What interest could he convey? Before a vested right could accrue; before any interest could be transferred, *the map and field notes had to be first filed in the General Land Office within the time required by law.* This court said in its former opinion that the said Russ had "the right to complete the purchase and secure a patent within the prescribed period, *after the map and field notes were filed in the General Land Office;*" but neither on November 1, or 15, 1882, were they filed, and not until January 8, 1883, *67 days after said contract was made and 52 days after the date of*

its breach; therefore, in all seriousness, we further contend that he had no assignable interest whatever in any of the lands surveyed prior to the execution of said contract.

SECOND QUESTION.

Did the said George W. Russ lose his right to recover, except as to twenty-four sections, because the field notes of the lands were not returned to and filed in the General Land Office within the time prescribed by law?

Section 3 of the Act of 1879 provided that "it shall be the duty of the surveyor to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases." By reference to section 6 of the Act of 1879, and the amendment thereto of 1881, it will also be observed that no tract of land should contain more than 640 acres. In this case there were 1813 sections of land of 640 acres each, and 1813 sets of field notes. Thus it is seen that each section of land had to be surveyed within three months, and that the field notes of same had to be returned to and filed in the General Land Office within sixty days after such survey—*not after the three months, but after the survey had been made.* The said Russ made two applications for the survey of 1813 sections of land, which were addressed to and filed by the county surveyor of El Paso county on October 4, and 5, 1882, respectively. The latter application only covered sections 1 to 48 inclusive, in block "I," which were surveyed on the 3, November, 1882. (Trans., 29–31.) The field notes of these sections were returned to and filed in the General Land Office on the 8, January, 1883 (Trans., 30) *just six days too late.* It will also be noted that *no testimony was offered on the trial of this case as to what lands, if any, the other application included.* (Trans., 29–31.)

All of the 1813 sections were surveyed between the 13, October, 1882, and the 3, November, 1882, except sections 1 to 24, surveyed on November 9, 1882. (Trans., 30.) The right to file the field notes of the surveys made on the 13, October, 1882, expired on the 12, December, 1882, and the field notes, as a matter of fact, were filed twenty-seven days afterwards, to-wit: January 8, 1883, the date on which all the field notes were filed in the General Land Office. (Trans., 29.) The field notes of sections 1 to 24, surveyed on 9, November, 1882, were filed just in time, and are the only surveys in compliance with the law. In other words,

the field notes of all the surveys were filed after the expiration of the sixty days, except as to the twenty-four sections mentioned. Therefore, we requested said Circuit Court to charge the jury as follows:

"You are instructed that the law required the field notes of the land to be returned to and filed in the General Land Office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the General Land Office within said sixty days; therefore the court charges you that you can only consider plaintiff's right in twenty-four sections of land." (Trans., 32.)

The court refused to give this charge, and said Circuit Court of Appeals held that it was no error.

It was unquestionably the duty of the said Russ to have had the lands surveyed and the field notes returned to the General Land Office within the time prescribed by law. He undertook to and did return the field notes to the General Land Office, but it was after the time required by law, except as to the twenty-four sections, *and hence every right was lost.*

It is true that Section 3 of the Act of 1879 required the surveyor to return and file the field notes, but in performing such a duty he represented the person who had made the application and paid him for his services, and nobody else; and it was the applicant's duty to see that the field notes were returned and filed in time, and if they were not, then he should suffer the loss. Section 9 of the Act provided that should any applicant fail, refuse, or neglect to pay for the land, he should forfeit all rights thereto and should not thereafter be allowed to purchase the same. Now did this forfeiture and prohibition apply to plaintiff in error? Certainly not, because he was not an applicant; he had not made any application, nor had he caused any lands to be surveyed and the field notes of same returned to the General Land Office. After a forfeiture had been declared, plaintiff in error could have filed on these identical lands and have purchased them, whereas, the said Russ could not. The forfeiture provided in Section 9 is reasonable. It is contained in the last section of the act, and was intended to apply *only to those persons who had made the application*, who had caused the land to be surveyed within ninety days, the field notes of same made out and returned within sixty days, and who then refused to pay for the land.

Now, the question is, who shall bear this loss? Whose fault was it that the field notes were not returned in time? *There was ample time to have returned them, and they could have been returned by the said Russ and filed in the General Land Office within sixty days just as easy as afterwards.* The question is answered in the case of Warren v. Stoddart, 105 U. S., 224. Mr. Justice Woods, speaking for the court in that case, said:

"The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could prevent." Citing Wicker v. Hoppeck, 6 Wall., 94; Miller v. Mariner's Church, 7 Me., 51; Russell v. Butterfield, 21 Wend. (N. Y.). 300; United States v. Burnham, 1 Mason, 57; Taylor v. Read, 4 Paige (N. Y.), 561.

THIRD QUESTION.

Under the Act of 1879, was a survey not made on the ground, but consisting of office work, void?

The pleadings of plaintiff in error upon this subject were as follows:

"6. This defendant further says that the eighteen hundred and thirteen sections of land mentioned in plaintiff's petition were never actually surveyed on the ground, but the field notes to same were made by and in the office of A. M. Randolph, county surveyor of El Paso county, Texas, and were and are now void and under which plaintiff can claim no right whatever." (Trans., 16.)

The testimony in this case clearly shows that between the 13, October, 1882, and the 9, November, 1882, there were 1813 sections of land surveyed, consisting of 1,160,320 acres. (Trans., 30.) It will be noted that there are 640 acres in a section, and that it is four miles around each section. (Trans., 32.) Now, to have surveyed these lands on the ground, the surveyor had to average about 67 sections per day, consisting of 42,880 acres, and travel 268 miles each day. The record shows that on the 13, October, 1882, there were 76 sections surveyed; on the 16, October, 1882, 45 sections; on the 18, October, 1882, 36 sections; on the 21, October, 1882, 58 sections; on the 22, October, 1882, 113 sections; on the 23, October, 1882, 97 sections; on the 24, October, 1882, 78 sections; on the 27, October, 1882, 207 sections; on the 28, October, 1882, 78 sections; on the 30, October, 1882, 74 sections; on the 31, October, 1882, 85 sections; on November 1, 1882, 96 sections, and on November 3, 1882, there were 74 sections surveyed. (Trans., 30.)

F. M. Maddox was the only surveyor who testified in this case. (Trans., 32–33.) He swore that none of these surveys could have been made by one person on the dates mentioned, and that the average number of miles that a man could survey in one day was ten to fifteen miles. (Trans., 32–33.) It was proven on the trial of this case that A. M. Randolph, who was the county surveyor of El Paso county in 1882, died four or five years ago. (Trans., 32.)

S. W. S. Duncan, however, testified by deposition for said Russ that, as his agent, he made application and filed on the 1813 sections in this suit; that he made a contract for said Russ with the county surveyor of El Paso county for surveying said sections; that there were employed by him in the survey and making the field notes between twenty and thirty people altogether; that he employed the county surveyor and all of his assistants, and himself helped in making the survey, and superintended the matter from making the application to finally turning the field notes over to said Russ to file in the General Land Office; that he knew the survey was made and the field notes returned to the General Land Office, because he superintended the survey and helped to take the field notes to the office, and saw said Russ pay the filing fee of one dollar per section; but, on cross-examination, this witness testified that it was impossible for him to state by whom any section of the land had been surveyed. (Trans., 34.) Now, if he had been connected with this matter, as he testified, is it not remarkable that he could not mention the name of some person who had surveyed one of these sections? The truth of the matter is, that none of these lands were surveyed on the ground, and that Randolph would have so testified had he been living. It is impossible for Duncan's testimony to be true, because the Act of 1879 required the surveyor of El Paso county to survey these lands, *and not employes, but himself and nobody else.* The law is as follows:

"Sec. 2. That any person, firm, or corporation desiring to purchase any of the unappropriated public lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof," etc.

Article 3908 of the Revised Statutes (Texas) of 1879, and which has been in force ever since, expressly requires the field notes of every survey, as will hereafter be seen, to be signed by the surveyor making the same, and it was admitted by counsel for said Russ upon the trial of this case, that the 1813 sets of field notes were signed by A. M. Randolph. (Trans., 34.) Thus it is clearly seen that no person except Randolph could have lawfully made these surveys, and it is also seen that it was an utter impossibility for him to have done so, except in the way of office work.

Mr. Maddox also testified that "block J" contained twenty-four sections, and could, by making only two corners to each survey, be surveyed by running only fourteen miles, but that twenty-four sections of land could not be surveyed by running fourteen miles if four corners were

made to each section, and if the surveyor only run fourteen miles he would then be calling for corners that he had not made; and on recross-examination the same witness said: "That would be actual surveying on the ground. That is, what is termed actual surveying on the ground is work done on the ground by which you could identify a survey. This work would be that kind." (Trans., 33.)

Now we submit that the latter part of the testimony of Mr. Maddox was simply an opinion, and in which he was mistaken. We have already seen that it is four miles around each section of land, and ninety-six miles round twenty-four sections. To survey twenty-four sections by only running fourteen miles, would not be surveying as much as one line of each section. Such work would not be surveying on the ground—it would not be surveying at all. Surveying only one side of a tract of land would not be a valid survey, nor would the making of only one corner constitute such survey. If a line is not run, how could you have field notes for it? If no corner had been made, how could you call for it? With only one side surveyed and one corner made, how would the field notes close?

But further noticing Duncan's testimony, let us, for argument's sake, admit that there were between twenty and thirty people employed, as stated by him, in surveying these lands; some of them had to be chain carriers, others back and front flagsmen, and could travel no faster than the man that handled the compass.

Mr. Maddox testified "that only one man could handle the compass—do the scientific work—and the assistance of a large number of flagsmen and chain carriers would not aid him in making speed." (Trans., 33.)

Why, the testimony of the said Russ shows that on the 27 day of October, 1882, there were 207 sections surveyed, aggregating 132,480 acres, and covering the vast distance of 828 miles, and we submit that if these twenty or thirty persons had been possessed with wings and have traveled at almost lighting speed, they could not have surveyed these lands on the ground, and hence we asked said Circuit Court to charge the jury as follows:

"If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the ground, then and in such case they are instructed that such surveys are void, and for such sections plaintiff can not recover; and if the jury should find that none of said sections were actually surveyed on the ground, then they are instructed to return a verdict for the defendant;" but the court refused to give this charge (Trans., 34), and said Circuit Court of Appeals held it was no error.

The case of Bacon et al. v. The State, 21 S. W. Rep., 149, is decisive of this question. In that case the Court of Civil Appeals of Texas said:

"The subject matter of this controversy is 466 sections, or 298,246 acres of land, situated in Scurry, Borden and adjoining counties. In 1873 the Houston and Texas Central Railway Company, for the purpose of locating its land certificates thereon, had a large amount of surveying done in Scurry, Borden, Howard, Kent and Fisher counties. This surveying was done by dividing large blocks of land into sections containing 640 acres each, as will be seen by reference to our conclusions of fact, and was done upon the ground in such a way as might be regarded as work in the field. The surveying so done by said railway company embraced all of the land in controversy in this suit, but its right thereto failed by reason of the land at that time being within what is known as the 'Texas and Pacific Railway reservation.'

"On December 1, 1882, E. M. Bacon and E. C. Graves made application to the proper surveyor to survey for them a large part of this Houston and Texas Central Railway Company land, embracing that in controversy in this suit, which they desired to purchase under the act of July 14, 1879, amended March 11, 1881, which was generally known as the 'fifty-cent act.' The surveyor, instead of doing this work upon the ground, simply adopted the work which had previously been done by the railway company, and copied their field notes from the records in his office, and the field notes so obtained were returned by Bacon and Graves as to the land in controversy to the General Land Office within the time required by the law above cited. Bacon and Graves, at the time they returned the field notes, knew how the surveyor had obtained them, and that none of the work had been done in the field. The deputies of the surveyor, however, who appeared from the certificates to the field notes to have done this work, had previously been upon the ground in making other surveys, and had seen enough of the railroad work to satisfy them of its correctness.

"The act under which Bacon and Graves were attempting to acquire this land provides that 'any person, firm, or corporation desiring to purchase any of the unappropriated land herein set apart and reserved for sale may do so by causing the tract or tracts which said person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated;' and the question as to whether or not the obtaining of the field notes in the manner above set forth should be considered as their having had the land surveyed, within the meaning of this act, constitutes the most important question for our decision in this case.

"Prior to the adoption of our Revised Statutes, in prescribing the manner in which the surveys were to be made, our law provides that 'The courses of the lines shall be determined by the magnetic needle,

and care shall be taken to determine its variation from the pole in the district where the surveys are made. The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearings and distances of two permanent objects at least.' Under this law, at an early day the practice became so common among surveyors to disregard its provisions by making out field notes in their offices from data obtained otherwise than by work done on the ground, that the courts, in a great number of cases, have felt constrained to hold that where the question was raised by subsequent locators, or third parties adversely interested, such acts on the part of the surveyor would constitute a valid appropriation of the land as against such claims. Horton v. Pace, 9 Texas, 84; Jenkins v. Chambers, Id., 231; Jones v. Burgett, 46 Texas, 293; Stiles v. Gray, 10 Texas, 506. And in Thompson v. Railway Co., 68 Texas, 392 (4 S. W. Rep., 629), strong language is used recognizing the adoption of field notes previously surveyed as being a legal survey within the spirit of our law as it stood previous to the adoption of our Revised Statutes. At the same time it is not to be denied, that to constitute a survey strictly within the terms of our law as it has always been, it would be necessary for the work to be done upon the ground in the manner prescribed by the statute. In Stafford v. King, 30 Texas, 269, it is said: 'It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, to see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract, and to extend a correct description of these objects, natural and artificial, with courses and distances, into the field notes of the survey, in order that they may be inserted in the patent, which will afford the owner, as well as other persons, the means of identifying the land that was in fact located and surveyed for the owner.' And in Sanborn v. Gunter (Texas Sup.) 17 S. W. Rep., 121, it is said: 'Actual surveys, by which lands granted by the State shall be specially described and distinguished, have always been contemplated and prescribed by law. It is true that, under the laws in force when the surveys in controversy were made for the railway company, it was not always regarded as indispensable, however desirable, that the line of the survey should be actually run and measured on the ground. Recognizing the great inaccuracies that had frequently resulted from the practices of the different surveyors in attempting to make out field notes in their offices without surveying the land upon the ground, our Legislature, in adopting the Revised Statutes, inserted this provision (article 3908): 'The field notes of each survey shall state: (1) The county or district in which the land is situated. (2)

The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, when and where issued, name of original grantee, and quantity. (3) The land by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas). (4) A diagram of the survey. (5) The variation in which the running was made. (6) It shall show the names of the chain carriers. (7) It shall be dated and signed by the surveyor. (8) The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page. (9) When the survey has been made by a deputy, the county or district surveyor should certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record.'

"We think the principal object of the Legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected as above indicated, and we think it must be conceded if the Legislature has the power to condemn what is commonly known as an 'office survey,' or 'office work,' and to require its officers, before parting with the public land of the State, to have the surveying actually done in the field, it has done so by the passage of this statute. We know of no case in which the question has been raised as to the validity of an office survey or the adoption of previous field notes for a survey which should have been made in the field since the adoption of our Revised Statutes; but our Supreme Court, in several cases, has given strong intimations that its ruling under the previous laws would not apply to such surveys.

* * * * * * * * * *

"Had an individual owned this large body of land, and had published and offered to sell to any person 640 acres, who would have it surveyed by the authorized public surveyor of the county in which the land was situated, and that such surveyor must certify that the work was actually done in the field, we think it would hardly be contended that the proposed purchaser could file his petition against the owner, setting up that the surveyor had copied some field notes for him from work which had been done by some other surveyor years before, and that, by reason of the field notes thus obtained, he had a right to compel the owner to accept such field notes as a compliance with his offer, and to execute a deed for the land embraced therein; and we see no reason why a different rule should be applied to the State than that applied to an individual, under similar circumstances."

The Supreme Court of Texas denied a writ of error in the case of Bacon et al v. The State, thereby sustaining the opinion of the Court of Civil Appeals and holding that the field notes were void.

And hence we submit that if the survey was not made on the ground, it was void, and being void, the matter stood as if no survey had been made at all. Without a valid survey, as already seen, there could be no right, title or interest which the law could recognize.

J. L. PEELER,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
FEB 28 1895
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894. No. 813.

COUNT JOSEPH TELFENER, Petitioner,

vs.

GEORGE W. RUSS.

Brief and Argument for Defendant in Error, George W. Russ.

JOSIAH PATTERSON and
JOSEPH WHEELER,
Attorneys For Defendant in Error.

Commercial Printing Co., 908 Pa. ave.

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vs.

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Brief and Argument for Defendant in Error, George W. Russ.

STATEMENT OF THE CASE.

1st.

Under and by virtue of a law of the State of Texas, Geo. W. Russ, the defendant in error, by complying with the provisions of said law, had prior to the first day of November, 1882, become the sole owner of a valuable interest in 1,160,320 acres of land in the State of Texas.

2d.

On November 1, 1882, Count Joseph Telfener, the plaintiff in error, by his agents, contracted with Russ

to purchase from him all the right, title and interest of the said Russ to said land at and for the sum of 25 cents per acre, the said Count agreeing to proceed at once to inspect the records of Russ' applications and files and, if said records and files showed that said applications and files had been regularly and properly made so as to entitle Russ to become the purchaser of said lands, the said Count Telfener agreed to pay the said Russ, in cash, 90 per centum of the said purchase price for the number of acres embraced in or covered by Russ' applications and files. It was further agreed that the Count's inspection should be completed before the 15th of November, 1882, and that the Count should not be entitled to any delay after that time for making the payments aforesaid.

3d.

By another contract made on the same day, it was agreed and stipulated between said Telfener and said Russ that, whereas, it would be necessary to complete the surveys of said lands, etc., that if the sale and transfer should be made under the said contract as aforesaid, the said Russ would, at his own proper cost and expense, make all the surveys, etc., of said lands and pay all the fees required to be paid; and the said Count Telfener agreed and bound himself to pay said Russ 5 cents per acre for the services rendered and payments made by said Russ in making the surveys, maps, etc., of said land.

4th.

The Count failed to pay anything to the said Russ on the 15th of November and has never since paid him anything. This relieved Russ from any obligations to have the lands surveyed, nevertheless said Russ hoping that the Count would pay him, and also pay the State of

Texas, as stipulated in the contract, proceeded to complete the surveys, etc., of said lands. The failure of the Count to pay the amount due the State of Texas caused the lands to revert to the State, thus resulting in a total loss to Russ.

5th.

Russ sued Count Telfener in the State Court of Texas; the case was removed to the United States Court. Judgment was rendered against Telfener and in favor of Russ.

6th.

A writ of error was sued out in the Supreme Court of the United States, and upon hearing and argument two questions were presented. (1st.) Whether the plaintiff below, the defendant in error in the Supreme Court, acquired any assignable interest in the real property described in the contract upon which the action is brought.

Upon this point the Court said:

"That if a right to purchase land for however short "a period is vested in one, it is a valuable right, and "is, in that sense, property, and in the absence of ex- "press prohibition would be, therefore, assignable."

(2d.) The other question presented was:

"Assuming that he (plaintiff Russ) had an assignable "interest, whether the rule for the measure of damages "for breach of the contract for such interest by the "defendant was correctly stated to the jury by the "Court."

This Court held that the judge who tried the case in the Unites States Circuit Court, erred in his charge as to the proper measure of damages sustained by Russ, and upon this ground judgment was reversed.

7th.

The case was again tried by the United States Circuit Court, and on July 12, 1893, judgment was again rendered in favor of Russ and against Count Telfener.

8th.

Count Telfener then sued out a writ of error to the United States Circuit Court of Appeals and after a full hearing on January 24, 1894, the judgment of the Circuit Court of the United States was on February 6, 1894, in all things affirmed.

9th.

On March 7, 1894, a petition for rehearing was entered and filed, and after a full consideration of the case, a decree was rendered by the Court of Appeals, still adhering to its decision affirming the judgment of the United States Circuit Court, and mandate duly issued to the Circuit Court.

10th.

Plaintiff in error thereupon petitioned for and obtained from this Court a certiorari and in compliance therewith the case is now certified to this Court for its revision and determination from the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of section 6 of the act approved March 3, 1891, entitled "An act to establish Circuit Courts of Appeals and to "define and regulate in certain cases the jurisdiction of "the Courts of the United States, and for other pur- "poses."

Six assignments of error appear in the Record.

ARGUMENT.

The first assignment of Error is as follows:

"The Court erred in permitting the plaintiff, George "W. Russ, to offer in evidence and read to the jury, "over defendent's objection, the following telegrams "from C. K. Westcott to C. Baccarisse, to-wit:"

(1) "*Oct.* 26, 1882.

"To CHAS. BACCARISSE:

"Provided there is at least one million (meaning "acres of land), close at eighty, General (meaning the "plaintiff) to undertake surveys and perfect things for "issuance patent. Funds for commencing surveys shall "be deposited immediately. Expert's favorable report "and certified papers reach Count (meaning the defend-"ant) say within time specified by you. Commission "to be paid on certificate from Land Office that field "notes are returned and patent will issue in Bosses' "name (meaning defendant), he will pay state directs "Sign contract to mail or express certified copy file "and map in duplicate; this will save much time and "enable inspection probably in six days. Look up "Presidio and Pecos affairs, mailing certified papers "and maps. Wire before you leave.

"C. K. WESTCOTT."

(2) "*Oct.* 27, 1882.

"To C. BACCARISSE, San Tone:

"Yours twenty-fifth was answered immediately. "Why did you not wait after asking a reply, knowing "the thing to be so important? Go back and close at "eighty, as instructed.

"C. K. WESTCOTT."

(3) "*October* 28, 1882.

"To C. BACCARISSE, S. T.:

"You never got my message of twenty-fifth because

"you did not wait for it. If you have received recent "orders from Count (meaning the defendant) not to close "at eighty, wire me, if not, close at eighty. General "(meaning the plaintiff) to undertake surveys and "make everything straight for issuance of patents. "Funds for commencing surveys shall be deposited "immediately after expert's favorable report reaches "Count (meaning the defendant) say within time spec-"ified by you. Commission paid on receipt of certifi-"cate from Land Office, field notes are got and "patents will be issued. Count (meaning the defend-"and) will pay state direct. Sign contract and mail "or express certified copy of file and map. This will "save much time and enable to have land inspected "probably within five or six days.

"C. K. WESTCOTT."

(4) "*Nov.* 1, 1882.

"To C. BACCARISSE:

"Accept General's (meaning the plaintiff) offer at "twenty-five cents for transfer his file, same to be made "as suggested by him after verifying correctness of "same with county surveyor and Land Office records. "Send immediately certified copies of file, map and "contract.

"C. K. WESTCOTT."

"And to the introduction in evidence of each of said "telegrams defendant objected upon the ground that "the plaintiff had not alleged in his petition that C. K. "Westcott was the defendant's agent or that the said "Westcott was authorized to empower the said C. Bac-"carrisse to make the contract sued on, and all of "which more fully appears from the defendant's bill "of exceptions number one."

The second assignment of error is as follows:

"The Court erred in charging the jury, as follows:

"If, from consideration of the evidence, you concluded that Baccarrisse had authority, direct from "the defendant, to execute the contract in his behalf, "then it would be binding upon the defendant. It "would also be binding upon the defendant if Westcott, "with authority from and knowledge and consent of "defendant, empowered Baccarisse to execute it.

"If you find from the evidence that Baccarisse had "authority from the defendant, or from Westcott, with "the defendant's assent, approval and knowledge, to "contract with individuals generally for the purpose of "procuring lands under the act of the Legislature of "1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts "came within the scope of his authority, and defendant cannot avoid liability thus created.

"The defendant specially excepted to the giving of "the charge herein set out at the time the same was "read to the jury, upon the ground that there was no "pleadings upon the part of plaintiff authorizing such "a charge, as is fully shown by defendant's bill of "exceptions number two."

These two assignments of error may be treated together. Plaintiff, in his petition, alleges that "the plaintiff in person, and the defendant, by his agent, at the City of Dallas, Texas, on the first day of November, A. D. 1882, executed a written contract evidenced by two separate instruments, each of which is made a part of this petition by a copy attached hereto and marked "Exhibits M and N."

These exhibits are a part of the petition, and show that each purports to have been signed "J. Telfener, by C. Baccarisse, Agent." The defendant, without

exception to the sufficiency of the petition joined issue and properly so because certainly no exception could be taken to the particularity with which plaintiff set out that defendant had entered into a contract through the instrumentality of his authorized agent. But the plaintiff does not complain of the sufficiency of this averment, but of the absence of an averment that Baccarisse derived his authority from Westcott and not from Telfener. The burden of proof was on plaintiff to sustain his allegation that Baccarisse was authorized to act for Telfener, but it was not incumbent on him to particularize and show in his petition the method of appointment. This fact of agency was especially within the knowledge of Telfener. Baccarisse held himself out as Telfener's agent, and plaintiff acting on his representation entered into the contract.

While such representations do not conclude Telfener, and plaintiff is required to prove affirmitively the agency, or a ratification of Baccarisse's acts, yet the fact of agency may be established by any competent evidence. Telfener could employ an agent directly or through another authorized agent, or he might constitute Bacarisse his agent indirectly by acts and conduct and dealings in respect to the transaction which in law would constitute him his agent. To require plaintiff to allege the method of his employment, would preclude him from the introduction of proof to show that Baccarisse had been constituted his agent in some other way.

If the law requires him to aver in the petition that Baccarisse was constituted his agent through the agency of Westcott then this averment being material the plaintiff could not show that Telfener had directly appointed Baccarisse. No such averment is material and plaintiff therefore was at liberty to establish the agency by any competent evidence. The telegram sent by Westcott to Baccarisse would not have been competent evidence had not the agency been in evidence. The

answer of Telfener conceives the agency of Westcott and substantially admits the employment of Baccarisse by Westcott, in pursuance to his agency in respect to the acquision of lands in Texas under the act of the legislature of 1879. That part of the charge of the court embraced in the second assignment of error taken in connection with the entire charge is a correct statement of the law applicable to this case. If Westcott acting within the general scope of his authority from Telfener constituted Baccarrisse the agent of Telfener to make the contract in question, or if he constituted him such agent with Telfener's knowledge, consent and approval, then the contract would be binding on Telfener, notwithstanding he had given instructions to Westcott or Baccarisse without the knowledge of plaintiff not to conclude him by the contract until the same was referred to him for approval. The principle is too well established to be now controverted that where an agent acts within the scope of his authority his principal is bound by his acts notwithstanding he may have disregarded instructions given by the principal which were not brought to the knowledge of the party with whom he is dealing.

The third assignment of error is as follows:

"The Court erred in refusing to give the jury defend-
"ant's special charge number thirteen, which is as
"follows:

"Defendant asks the court to charge the jury as
"follows:

"The Court instructs the jury that the right, title and
"interest of plaintiff, in his application and files in
"lands, and which he contracted to sell, was not a
"vested right on the first day of November, 1882, in
"or to any land surveyed after that date. The accep-
"tance by the surveyor of plaintiff's application for
"land invested plaintiff with no right that he could

"sell and for such sections of land surveyed after said "November first, 1882, you will not consider or include "in the measure of damages."

The Supreme Court of Texas in the case of "The State of Texas *v.* Work, 63 Tex. 148" held that persons who had done nothing more than to make application for surveys prior to the act of January 22, 1883, which withdrew from sale the land put on sale by the Act of July 14, 1879, and the amendment thereto, had no vested rights to the land which they sought to purchase. This is evident from a consideration of the Act itself, and persons claiming rights under it must show that they have had done such acts in connection with the law as entitled them to the land.

The applicant could not become a purchaser or have such vested right to the land as would bind the State and preclude it from withdrawing the land from the market until he caused the tract or tracts which he desired to purchase to be surveyed. It does not follow that, because the applications and files of the plaintiff did not amount to a purchase or preclude the State from withdrawing the land from sale under Act of July 14, 1879, that such applications and files did not give the plaintiff such an interest as would amount to a consideration. His application for the purchase of the land had been received, filed and recorded by the surveyor of El Paso county some time prior to the first of November, 1882, the date upon which plaintiff made his contract with Telfener, and as the transcript of record, page 37, shows, the surveyor had not only accepted the applications as being made by a responsible party, but had entered into a contract for the survey of the lands. At this stage of the proceedings the contract was made whereby all the plaintiff's rights under his applications and files to the lands were to be assigned by deed to Telfener after they were surveyed, and the absolute right to purchase them under the Act of July

14, 1879, had been acquired. This was certainly a sufficient consideration to support the contract. But there is another view of it.

The application of plaintiff embraces 1813 sections of land, or rather a body of land, which, when surveyed, amounted to that number of sections. It was one enterprise, one transaction. The application embraced the entire body. The contract of the surveyor of El Paso county was to survey the entire body. The contract of plaintiff with Telfener was for the entire body. He was not to pay for the transfer until the records were examined in the surveyors' office of El Paso county, and it was ascertained that the applications and files were regularly and properly made "in such manner as under the terms of the law would entitle the plaintiff to have the purchase of said lands from the State of Texas."

Now what are the facts disclosed in the record of the certificate of the Commissioner of the General Land Office? It shows that 1715 sections had been surveyed prior to the first day of November, 1882, the date of the contract with Telfener, and that the remaining 98 sections were surveyed within nine days thereafter, the whole survey being completed three days prior to the 15th day of November, 1882, when Telfener was to make payment. It was an entire transaction, and there was no want of consideration as to any part of it. Plaintiff had rights and they were being perfected as rapidly as possible to the entire body of lands, and when the time came for Telfener to pay the considertion, the plaintiff stood ready to make his deed according to his contract with a vested interest and right to purchase every acre of land embraced in his applications and files.

The tendency of the decisions of the Courts has been to enlarge and liberalize the right of one to assign any valuable interest in property, and it seems hardly necessary to quote authorities on this subject.

Burrill on Assignments, par. 65, note 4, says:

"A purchaser's right to a deed of land agreed to be "conveyed is assignable," citing:

Brown *v.* Chambers, 12 Ala., 697.

Ensign *v.* Kellogg, 4 Pick. 1.

Rodgers *v.* Dibrell, 6 Lea, 74 Tenn., 69.

"A right to call on a Trustee to convey an estate in "fee is an equitable interest or chose in action which "may be assigned," citing:

Coverdale *v.* Aldrich, 10 Pick. 391, 395.

"The assignment of a contract to convey an interest "in real estate upon the performance of certain con- "ditions vests an equitable interest therein in the as- "signee, which will be protected and made available "by the Courts of law," citing:

Dyer *v.* Burnham, 25 Me. 9.

When this case was before the Supreme Court of the United States on a former occasion, this Court, in referring to this point, said:

(145 U. S. Reports, page 532.)

"It would seem that if a right to purchase land for "however short a period is vested in one, it is a valuable "right, and is, in that sense, property, and in the ab- "sence of express prohibition, would be, therefore as- "signable. Such is apparently the import of language "used by the Supreme Court of the State in some of its "decisions. White *v.* Martin, 66 Texas; Jumbo Cat- "tle Co. *v.* Bacon, 79 Texas 5."

This matter was fully and laboriously considered by the Circuit Court of Appeals, and after reviewing the the evidence, they say:

"This contract was a valid and binding contract at "the time it was entered into, unless it was prohibited "by law or public policy, which is not contended."

We feel that there can be no question but that Russ possessed an assignable interest in the property described in the contract and upon which the action was brought.

The fourth assignment of error is as follows:

"The Court erred in refusing to give to the jury de-
" fendant's special charge number fourteen, which is as
" follows:

"Defendant asks the Court to charge the jury as fol-
" lows:

" You are instructed that the law required the field
" notes of the land to be returned to and filed in the
" General Land Office within sixty days after the same
" was surveyed. The evidence shows that the field
" notes of only twenty-four sections of land were re-
" turned to and filed in the General Land Office with-
" in said sixty days, therefore, the Court charges you
" that you can only consider plaintiff's rights in twenty-
" four sections of land."

The Court should have refused the charge as requested, for two reasons. The first is that plaintiff's application was to purchase a certain body of land which the surveyor was to survey and divide up into sections. The law did not contemplate that the surveyor should return and file his field notes in the General Land Office of the survey of each separate section as the work was done. This would have involved 1813 separate files of field notes under plaintiff's application to purchase a body of land which, when surveyed, turned out to be 1813 sections. The survey began on the 13th of October, 1882, a few days after the applications were filed on the 4th and 5th of October, and continued until the 9th day of November, 1882, when it was concluded. The field notes were filed by the surveyor in the General Land Office on the 8th day of January, 1883, within the sixty days required by law, after the completion of the survey.

The other reason is that when Count Telfener failed to comply with his contract by paying ninety per cent. of the purchase money on November 15, 1882, the rights and liabilities of the parties became fixed. Noth-

ing more was required of plaintiff. It was not required of him to take any other steps in order to maintain his rights. Under the contract, Exhibit N, to the petition, he was for a consideration therein named to assist in perfecting the title, but this was only in the event that Telfener complied with his contract to pay the 90 per cent. on the 15th of November. His failure to do so relieved the plaintiff of any obligation to proceed further and plaintiff's right of action then accrued.

The fifth assignment of error was as follows:

"The Court erred in refusing to give to the jury the "defendant's special charge number 16, which is as fol- "lows:

"Defendant asks the Court to charge the jury as fol- "lows:

"If the jury find from the evidence that any of the "sections of land described in plaintiff's petition were "not actually surveyed on the ground, then and in "such case they are instructed that such surveys are "void, and for such sections plaintiff cannot recover; "and if the jury should find that none of said sections "were actually surveyed on the ground, then they are "instructed to return a verdict for the defendant."

The Court was here requested to instruct the jury that if any of the sections of land were not actually surveyed on the ground then the surveys as to such sections would be void, and if the jury should find that none of said sections were actually surveyed on the ground, then the survey of the whole would be void, and that the verdict should be for the defendant.

The Court rightfully refused this charge, upon the ground that a failure on the part of Telfener to comply with his contract on the 15th of November relieved Russ of any obligations to survey the lands. The cause of action then accrued and the liability of Telfener was fixed without regard to the correctness of the

surveys which had been previously made at instance of Russ, the plaintiff below and the defendant in error in this Court.

The Court, however, evidently acted correctly in refusing this charge for another reason. It assumes that no matter what other field notes may have accumulated in the office of the surveyor, or what information might be accessible to him in his office to correctly make out his field notes, plats, etc., he should in person have made a physical survey of each section. This is "sticking in the bark" and attaches a strained and unreasonable meaning to the word survey. According to this interpretation, a surveyor could not employ a deputy to assist in his work, which it will not be denied he may, in many cases of necessity must, do.

The surveyor of a county, especially in a new country, necessarily accumulates in his office maps, field notes and other data which will relieve him from repeating his work. He is officially responsible for the correctness of his field notes and it is not material whether he acquires the data from which they are made out on the grounds at each survey, or from notes obtained at previous surveys which stand recorded in his office.

The sixth assignment is as follows:

"The Court erred in overruling defendant's motion "for a new trial and in not setting aside the verdict "rendered herein and granting him a new trial."

As to this assignment, it is not necessary to go farther than to quote from the opinion of the Judges of the Circuit Court of Appeals, who said:

"It is well settled that a refusal to grant a new "trial cannot be assigned as error."

To conclude, every point assigned as error in this cause has been exhaustively investigated and considered by the Judges of the Courts of the United States

where this case has been tried.

The plaintiff in error, Count Telfener, first removed the case from the State Court of Texas to the Federal Court. After a most able defense, judgment was rendered against him March 9, 1887.

The defendant, Telfener, then moved the Court to set aside the verdict of the jury, alleging sixteen (16) different and specific grounds therefor, and after full argument by the attorneys, the motion was considered by the Court and overruled.

The case was then appealed to the Supreme Court of the United States and reversed upon a point which has been corrected in the second trial in the United States Circuit Court, where judgment was again rendered in favor of Russ. Count Telfener then carried the case to the Court of Appeals and the judgment of the lower Court was in all things affirmed, and an opinion rendered showing that every point in the case was fully considered by said Court. Application for a rehearing followed, and after exhaustive investigation it was denied.

The case was then brought to this Court by a writ of certiorari.

We feel confident this Court will find there is no error in the record.

JOSIAH PATTERSON and
JOSEPH WHEELER,
Attorneys For Defendant in Error.

Office Supreme Court, U. S.
FILED.
MAR 8 1895
JAMES H. McKENNEY,
CLERK.

TELFENER
v.
RUSS. } No. 813.

As attorneys for defendant in error did not have a copy of the last print of the transcript of the Record and, therefore, in the argument cited pages from the wrong transcript, they request permission to file the following with correct citations:

The first point insisted upon by the plaintiff in error, is the 3d assignment of error, namely:

A contention that as the record shows that 98 sections of land were surveyed after November 1st, the date of the contract between Russ and Telfener, that consequently Russ did not have any interest in the said 98 sections of land which he could assign.

The next point argued by the plaintiff in error is the 4th assignment of error, the gravamen of which is that the right which Russ obtained by filing his application with the surveyor of El Paso county, and causing these lands to be surveyed, was lost by the failure of the surveyor to return the field notes to the General Land Office within 60 days from the date of survey.

The next point argued by the plaintiff in error is found in the Record as the 5th assignment of error. This is a contention that the surveys of the land were not made upon the ground and that they were, therefore, void.

All three of these contentions involved practically the same legal question and can be answered with the same argument.

The Record, page 8 side page 11, and page 15 side page 17, and page 19 side page 22, shows that the judgment was based upon the breach of Telfener of the contract referred to as Exhibit "M." This was a contract of sale by Russ to

Telfener of all the right, title and interest which Russ had on November 1, 1882, by reason of certain applications made by the said Russ and duly filed in the surveyor's office of El Paso county, for the purchase of land under the Act of July 14, 1879, and amendments thereto.

The contract especially provided that after the transfer and assignment, the said Count Telfener should proceed without delay to have the land surveyed, etc., as required by law.

This shows that the contract only contemplated the sale, transfer and assignment of such interest as Russ had on November 1, and the duty of perfecting the title to the land was specially assumed by Count Telfener.

It is true that afterwards, by another contract marked Exhibit "N," page 11 side page 13, it was stipulated that if sale and transfer should be made as provided for in the former contract the said Russ should assume the burden of completing the surveys at and for the sum of five cents per acre.

Now as the Count failed to comply with his contract on November 15, as stipulated, the condition upon which Russ bound himself to complete the surveys under the second contract never became operative and never had any existence. This Court has already settled that point, 145 U. S. Courts page 533, as follows:

"On the 15th of November, he (Russ) possessed all the right to the land which he ever possessed, and assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

The Court of Appeals expresses itself very clearly upon this point, 49 side page 62.

Now if it was not incumbent upon Russ to survey the land at all, nor to file the field notes in the Land Office, it certainly makes no difference how the surveys were made or when the returns were filed or whether the surveys were made before or after the date of this contract.

To recapitulate, the complaint, page 8 side page 11, claims the purchase price for the assignment 25 cents an acre in

accordance with contract "M," and in addition 5 cents an acre for surveying lands, filing field notes, maps of said surveys, etc., as per contract "N," which amounted to $58,016.

The defendants' answer, page 15 side page 17, excepts to so much of the complaint and the allegations of the petition of complainant as seeks a recovery of damages for anything done by plaintiff, Russ, or any expense incurred by him in carrying out any of the terms of the contracts after the 15th of November, 1882.

Page 19 side page 22, the Court charged the jury sustaining Count Telfener on this point and instructed the jury that plaintiff could not recover of defendant any damages because of a breach or supposed breach with reference to Exhibit "N," Exhibit "N" being the contract under which Russ expended the money and did the work for which he was to receive $58,016.

There is no contention and has been no contention in any of the trials that there was any infirmity in the applications for purchase by Russ. It is apparently admitted that his applications for purchase were regularly and properly made according to the provisions of the law.

In point of fact, twenty-five sections which were included in the applications were of necessity regular in all respects because the transcript shows, page 30 side page 34, that the applications for surveys of sections 1 to 16 inclusive in block G, and 35 to 44 inclusive in block I, were completed in all respects, and patents were issued by the State of Texas. All the applications were precisely similar to the applications for the above named tracts which were adjusted by the State of Texas to be regular and therefore this shows that they all were regular.

It may seem inexplicable to the Court why the plaintiff in error, Count Telfener, failed to comply with the contract and pay Russ the money as stipulated on November 15th, 1882. This is explained by the Count on page 48 of the Record. His attorney says:

"Section 9 of the Act provided that should applicant fail, "refuse or neglect to pay for the land, he should forfeit all "rights thereto and should not thereafter be allowed to pur- "chase the same. Now did this forfeiture and prohibition "apply to the plaintiff in error? Certainly not, because he "was not an applicant—he had not made any application,

"nor had he caused any lands to be surveyed and the field "notes of same returned to the General Land Office. After "a forfeiture had been declared, the plaintiff in error could "have filed on these identical lands and have purchased "them."

There is nothing in the Record to show that Count Telfener's desire to purchase the lands was any less on November 15 than it was on November 1.

There is nothing in the Record to excuse the Count from complying with his contract or to impair his obligation, but his own statement, or that of his attorney who speaks for him, shows that it had become apparent to him that if he did not comply with his contract and in consequence thereof the preliminaries required by law were neglected, not only would the land revert and the rights of Russ be forfeited, but under the Statute, Russ would be debarred from again making applications to survey with the view of purchasing said land. This would therefore enable the Count to make application and thus acquire the land without paying the 25 cents per acre to Russ.

As before stated, the Record shows that there was not one particle of evidence introduced giving any reason or justification or excuse on the part of Telfener for not complying with his contract and paying 90 per cent. of the 25 cents per acre to Russ on November 15.

Even if financial troubles had made it difficult for the Count to pay promptly on November 15, he should have notified Russ, and thus have given Russ an opportunity to sell to another. Count Telfener having by his own acts prevented the contract, Exhibit "N," from becoming operative, then the first contract, Exhibit "M," immediately became restored to its full force and effect, and although the Count failed to comply with that part of the contract which stipulated for the payment to Russ on November 15, this did not excuse him from complying with that part of his contract, Exhibit "M," which stipulated that he,

"the said Count Telfener, shall proceed without delay and "have said lands surveyed and platted, and the field notes "thereof returned and filed according to the provisions of "said law."

Tr. page 10 side page 13.

Count Telfener and his authorized agent knew that damage was being suffered by Russ every day that the payment was delayed after November 15, and it was his duty to make that damage as little as possible by completing the surveys and filing the field notes in accordance with his contract. This he did not do and I ask the Court to note the fact that the entire defense set up here is based upon an alleged neglect upon the part of Russ to properly survey the lands and promptly file the notes in the Land Office, a duty which under the conditions created by Telfener devolved upon him (Telfener) and not upon Russ.

How different the conduct of Russ. He was ready on November 15, and since that time, to assign and transfer to Telfener, and notwithstanding Telfener's failure to pay him the money, in his anxiety to lessen the damage as much as possible, and as far as possible prevent damage to Telfener, he proceeds to and causes the land to be platted and the field notes thereof returned and filed in the Land Office, paying at the same time $1 per section.

In this brief argument it will be seen that we have confined ourselves strictly to the Record. For the Court to have given the charges numbered 14 and 16, page 38 side pages 41 and 42, would have instructed the jury that Russ was bound by the stipulations of contract, Exhibit "N." This the Court could not do because it had previously charged the jury that Exhibit "N" had never become operative, and that therefore Russ could not claim any damages under said agreement, cited in Exhibit "N."

JOSIAH PATTERSON and
JOSEPH WHEELER,
For Defendant in Error.

Office Supreme Court, U. S.
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No. 813.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

COUNT JOSEPH TELFENER, PLAINTIFF IN ERROR,

vs.

GEORGE W. RUSS, DEFENDANT IN ERROR.

On Writ of Certiorari to the United States Circuit Court of Appeals For the Fifth Circuit.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CLARENCE H. MILLER,
FRANZ FISET,
Counsel for Defendant in Error, George W. Russ.
S. R. FISHER,
HANCOCK & SHELLEY,
Of Counsel.

HUTCHINGS PRINTING CO., AUSTIN.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

A full statement of the case is essential to a correct understanding of the questions presented to this court.

Whilst the act of July 14, 1879, and its amendments, quoted in the brief of plaintiff in error, were in force, to-wit, November 1, 1882, the parties to this suit entered into the contracts contained in the Exhibits "M" and "N" annexed to plaintiff's petition.

I.

Exhibit "M" (Tr., 11–13) is as follows:

"THE STATE OF TEXAS, }
"COUNTY OF DALLAS. } ss:

"This contract and agreement entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows:

"Whereas said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the State of Texas,

under and by virtue of an Act of the Legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said Act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso county, at Ysleta; and whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, titles and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the State of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer and assign unto the said Count Telfener all his rights, titles and interest in said lands acquired by his application and files.

"In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

"The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly and properly made as aforesaid and according to the provisions of said law and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said surveyor's office and in the office of the Commissioner of the General Land Office of the State at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city

of Dallas or the city of Austin, Texas, as said Russ shall prefer, 90 per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary conveying, transferring and assigning unto the said Count Telfener all and singular the rights, titles and interests that the said Russ *now has or may be entitled to* in and to said lands by reason of such application and files, binding himself by *covenant of warranty against all persons claiming or to claim the same or any part thereof by, through or under him.* It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation shall be completed on or before the fifteenth day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

"After the transfer and assignment as aforesaid shall have been made by the said Russ the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted, and the field notes thereof returned and filed according to the provisions of said law.

"Upon the completion of said surveys and field notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin Texas, as the said Russ may prefer.

"Witness our hands, this first day of November, 1882.

"GEO. W. RUSS.
"J. TELFENER.
" By C. BACCARISSE, Agt.

"Witness: CHAS. FRED. TUCKER.
"WM. MCGRAIN."

II.

The supplementary contract contained in "Exhibit N," after referring to the making of the above quoted contract, and the necessity, *provided the contemplated sale and transfer is made*, of taking the other steps required under the law to procure a patent to the lands, reads as follows:

"Now, therefore, it is agreed by the said Russ that *if* the sale and transfer shall be made under the said contract as aforesaid he will, at his own proper cost and expense, make all the surveys, field notes and maps of said lands and file them in the office of the surveyor of El Paso county and in the General Land Office of the State at Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field notes and maps to be correct, and in consideration of said services and payments to be rendered and paid by said Russ, the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted and returned by him as aforesaid, said payment to be made as follows, viz: Three (3) cents per acre *when the survey and field notes shall be completed*, and one (1) cent per acre when the field notes shall be filed in the land office, and the balance when the patents shall issue." (Tr., 13, 14.)

III.

To recover damages for the breach of both of said contracts this suit was brought, but defendant interposed a special demurrer to that part of the petition which sought damages for any thing done by plaintiff, or expenses incurred by him in carrying out, or attempting to carry out, any of the provisions of the contracts after the fifteenth day of November, 1882, that is the contract contained in "Exhibit N," and the court of its own

motion charged the jury in reference to the supplementary contract as follows:

"In reference to this contract, known as 'Exhibit N,' the plaintiff cannot recover of defendant any damages because of a breach, or supposed breach, thereof, and you are instructed accordingly." (Tr., 22.)

IV.

The petition of plaintiff, as regards the contract marked "Exhibit M," alleges, among other things, that on the first day of November, plaintiff was the sole owner of a certain valuable, valid and transferable interest in the whole of a certain body of land containing, as subsequently ascertained by survey, 1,813 tracts of 640 acres each, being an aggregate of 1,160,320 acres, situated in the county of El Paso, in the State of Texas; and that he had become such owner by complying with requirements of the Act of July 14, 1879, and of the amendatory Act of March 11, 1881.

The petition then details the mode in which the plaintiff became such owner; namely, that during the month of October, 1882, being a responsible party, and intending to purchase the said body of land which was subject to sale under the terms of the acts mentioned, he applied to the surveyor of the county of El Paso for the purchase and survey of the eighteen hundred and thirteen tracts, describing them by metes and bounds, course and distance, as a whole; and that said application, consisting of two instruments describing different portions of said lands, were duly filed and recorded in the surveyor's office in October, 1882; that he made the application pursuant to the instructions of the Commissioner of the General Land Office of the State to the surveyors of the counties and land districts containing lands subject to sale; that, having thus made due application for the purchase and survey of said lands, he was, on the

first day of November, 1882, about to have them surveyed into tracts of 640 acres each, when the defendant, by his duly authorized agents, applied to him to purchase his interest in the lands thus acquired; and that thereupon the plaintiff, not yet having paid to the State of Texas the 50 cents per acre, to which the State was entitled, and the defendant offering to assume such payment and desiring simply to contract with the plaintiff for the purchase and assignment of his right to purchase from the State, they entered into the contract contained in the said exhibit marked "M."

The petition alleges that by that contract the plaintiff sold and agreed to assign to the defendant, and the defendant purchased and agreed to accept from the plaintiff, at the price of 25 cents an acre, a conveyance of plaintiff 's application to purchase of the State 1813 sections of land, and at the time appointed the plaintiff was able and authorized to make the contracts and to execute and deliver a proper and valid assignment and transfer of his said application and all of his rights, titles and interest thereunder to the defendant.

The petition also contains allegations as to the arrangements provided in the contract for ascertaining that the application was in due form and regularly made and approximately the number of acres covered by it and the time allowed, to-wit, till November 15, 1882, for that purpose and for the first payment by defendant, and alleges that if it was found that the law had been complied with in said respects, the defendant was to pay plaintiff Nov. 15, 1882, 90 per cent of the purchase price stipulated. It also alleges that such inspection and ascertainment was completed by the parties on the sixth day of November, and it was found by them that the law was fully complied with; that plaintiff was ready to comply with his part of the contract, but defendant wholly made default, to plaintiff 's damages in the sum of 25 cents per acre for said 1,160,320 acres with interest thereon. (Tr., 3–11.)

Defendant appeared and, as far as material to the questions now involved, interposed a general demurrer to the petition, and the above special exception, entered a general denial of the allegations thereof, and a special plea that the 1813 sections of land were never actually surveyed on the ground, but that the field notes to same were merely office work, and therefore void. (Tr., 17, 18.)

V.

The bills of exceptions show the dates of the filing and recording in the county surveyor's office of Russ' said applications; the dates of the surveys of each of the 1813 sections of land; the date of the filing in the General Land Office of the said applications and the field notes of the said surveys; the sections of land covered by each application; that said surveys purport to have been made by the county surveyor of El Paso county, and his name is signed to each set of field notes of said 1813 sections; the testimony of plaintiff's agent, Duncan, that he made the contract for plaintiff with said surveyor to have the surveys made, employing between 20 and 30 people for that purpose, including said surveyor and all his assistants; that he himself helped in making the surveys and superintended the matter, and that the surveys purporting to have been made from October 13, 1882, to November 9, 1882, inclusive, were actually made on the dates stated, and the field notes were filed in the General Land Office and the filing fee of $1 per section paid by plaintiff; the receipt by the State Treasurer of the purchase money for 25 of the sections surveyed as aforesaid, and the filing of said receipt in the General Land Office; the certificate from said office that the purchase money was not paid on the other sections; the testimony of defendant's witness, Maddox, that Randolf who was, in 1882, county surveyor of El Paso county, was dead, and Maddox's testimony as an expert as to how many sections of land could be surveyed by one surveyor in one day. (Tr., 32–38.)

VI.

The court, after stating the issues involved and construing the contract, exhibit "M," instructed the jury that 1813 surveys of 640 acres each were made under plaintiff's application, but that as plaintiff claimed nothing as to twenty-five of these sections, the jury should consider only the remaining 1788 sections of 640 acres each, or 1,144,320 acres; that plaintiff's two applications filed in the surveyor's office of El Paso county October 4th and 5th, respectively, were a sufficient compliance with the law to make them valid applications; that they were regularly made and filed in such manner as, under the terms of the law, would have entitled plaintiff to become the purchaser from the State of the lands embraced therein, had the other provisions of the law been complied with, stating what the provisions were; that plaintiff filed in the General Land Office the field notes and map of said 1813 surveys of 640 acres each, and said surveys were all made before November 15, 1882, and all but ninety-eight sections before November 1, 1882; that the surveyor who surveyed the land upon plaintiff's application was the party to determine the responsibility of plaintiff and in the absence of testimony to the contrary, the presumption would be conclusive that plaintiff was a responsible person; that "the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his application as set forth in the contract and shown by the evidence, was a valuable right and one which could be lawfully assigned;" that "you will determine from all the facts and circumstances in evidence, whether plaintiff has in good faith performed all things required of him by said contract marked exhibit 'M' and whether he stood ready on 15th of November, 1882, to execute transfers to defendant of his right, title and interest in and to said 1788 surveys embraced in his two applications. You will further look to the evidence to determine whether defendant has performed his part of said contract, marked exhibit 'M' as by the terms prescribed, and has in ac-

cordance therewith paid to plaintiff the amount of money which he thereby agreed to pay." The court then proceeds to charge to the effect that if the jury find that plaintiff has performed his part of said contract and that defendant has failed to comply with his part thereof by declining to pay plaintiff as provided therein, then they should find for plaintiff, according to the rule stated in the charge, as to the measure of damages. (Tr., 19–25.)

The jury found for plaintiff the full amount of 25 cents per acre upon said 1788 sections, to-wit: for the principal sum of $286,080 with interest thereon, from November 15, 1882, the date of Telfener's default in payment. (Tr., 28, 29.)

VII.

The three assignments of error, based upon a paragraph of the court's charge and the refusal of the court to give three special requested charges, briefly stated, are:

1. That Russ had no assignable right in the 98 sections of land surveyed after the making of the contract, November 1, 1882, and the court should have so charged the jury.

2. That the field notes of only 24 sections were returned to and filed in the General Land Office within sixty days after the surveys were made, and hence Russ could only recover upon said 24 sections, and the court should have given the requested charge to that effect.

3. That the surveys—either all or ~~none~~ some of them—were not made on the ground, but were office work, and under the Texas decisions, void, and that the instruction requested on that issue should have been given.

Before taking up *seriatim* the three questions as to the above alleged errors, discussed in the brief of plaintiff in error, we desire to submit a proposition of law, which, we think, at once disposes of all the questions presented.

VIII.

The right, title or interest acquired by virtue of a valid application to purchase land from the State under act of July 14, 1879, accepted and filed by the proper county surveyor, was a sufficient consideration for a contract between individuals, and was assignable.

Russ in October, 1882, being a responsible party, and intending to purchase, made application to the county surveyor of El Paso county for the purchase from the State and for the survey of the 1813 sections of land in question, describing same as a whole by metes and bounds, courses and distances. This application was accepted by the surveyor and duly filed in his office. Prior to October 13, 1882, Russ made a contract with the surveyor—employing him and all his assistants—to survey said body of land into 640 acre tracts. (All but 98 sections had been surveyed before the contract in question was made, but for the present we will leave that fact out of consideration, except as showing that the surveyor considered Russ a responsible party). At this stage of the process towards accquiring a legal title, Count Telfener appears and desires to purchase this land from the State. He finds that Russ has already made application for the land, but believing the lands to be very valuable, and that his only chance of acquiring it was through Russ, he enters into the contract of purchase sued upon. It is now, however, insisted by Telfener that he was mistaken in this view, that Russ' position as regards the title to said lands was no better than that of any other citizen; that Russ' chance of acquiring a patent for it from the State was at that time no better than his own. Is this later view of Telfener's correct? Was Russ' application (he being a responsible party) in due form, accepted by the county surveyor, and properly filed, sufficient in itself to withhold the land from Telfener and other would-be applicants for a period of time? To state the question is to answer it. This is evident from the language of section 3 of the act. It reads: "It shall be the duty of the

surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof. * * ." While it is here not expressly stated that the surveyor shall survey under such applications in the order in which they are filed, if more than one should be accepted and filed on the same land, that is certainly implied. Any other method of procedure would not only be unjust to responsible applicants, but would defeat the purpose of the law—the sale of the lands.

A comparison of sections 1 and 8 of the act corroborates this construction. They read:

"Section 1. [Omitting irrelevant matter]. * * * * * The provisions of this act shall not be contstrued as to prohibit the right of pre-empting within the bounds of the reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act."

"Section 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void."

The fact that the right of pre-empting any of the lands appropriated for sale under the act was expressly reserved, and the further fact that it was unlawful for *any person* to file or locate upon said lands after a survey—the next succeeding step to filing an application—clearly evidences an intention that a responsible party should, by filing his application, have the exclusive right, except as against pre-emptors, for the period of three months, to take the next step towards acquiring a vested interest in the land applied for.

Russ' right to ultimately acquire a legal title by further proceedings under the law, however contingent and subject to chance it may have been, was certainly exclusive for three

months as against Telfener and other would-be applicants of the same class.

The only class of citizens that could defeat his right to purchase were pre-emptors to the extent of 320 acres each, but Telfener could not even have obtained that much of this land since he was and has remained an alien.

Under the principle announced in League v. Ryan, 59 Texas, 431, 432, Russ' interest was impregnable against attack by a junior applicant. Such interest was not worthless; for a worthless right gives no protection against any person: and it may be safely said that a right effective against some persons, but not against all persons, is at most not wholly valueless in the eyes of the law. The line which divides things considered valuable in a legal sense, from those which are considered valueless is not always clearly demarked. It is well established, however, that it is only necessary that the subject matter of a contract should be a thing of some value.

The question here is not whether the State could have repealed the act of July 14, 1879, and thus have defeated Russ' contingent right to acquire a legal title to the land, without thereby impairing the obligation of its contract. It is not a question of vested rights as between the State and Russ. We freely admit that Russ had no vested right in that sense. We insist, however, that he had a *valuable right*—something of such value in the eyes of the law that it would be a sufficient consideration to support a contract as between individuals. There are many rights recognized by the courts as valuable and the subject of contract which are not vested rights as against the State. Russ' rights with regard to the land in question was worth money to any one who wished to purchase the land, covered by his application, from the State. They could not supplant him and purchase from the State, except by paying him what he demanded. He was under no obligation to give up his position of advantage to Telfener, and if Telfener desired that position, and from his

knowledge of the lands considered it of value, why was not the giving up of that advantage by Russ a valuable consideration?

The assignment by Russ did not pass to Telfener either an absolute right to the land or to the right to acquire it, but it did pass a right to purchase the land as against every other person than the State or would be pre-emptors.

The authorities relied upon by plaintiff in error are inapplicable. They all go to the point that, before a survey under the act was made, the applicant had no vested right to the land applied for as against the State.

The first Texas case on that subject was Campbell v. Blanchard, 2 Posey Unreported Cases, 321. In that case the law was repealed before a survey of the land applied for was made. The applicant sought to mandamus the surveyor and compel him to make the survey. The Appellate Court said:

"The mere request to the surveyor to make the survey for appellant of lands designated will not bind the State to sell nor compel appellant to purchase. * * * It is clear there was no such contract with reference to the purchase of this land as would be protected by the constitutional provision which declares that no law shall be passed impairing the obligations of a contract."

The next case, State v. Work et al., 63 Texas, 148, was a suit by the *State* against parties claiming land under the act of July 14, 1879. The court said:

"The land in question was withdrawn from sale by act of January 22, 1883, and prior to that time it does not appear that Work had done anything tending towards acquisition of the land further than to file his application with the surveyor. In the case of Blanchard v. Campbell it was held that such fact gave no vested right to the land. * * * The decision in that case is decisive in this."

The next case, White v. Martin, 66 Texas, 340, was a suit of trespass to try title. Appellee made application for the pur-

chase of the land in controversy under the act of July 14, 1879, and had it surveyed before the act was repealed, but obtained a patent afterwards. Referring to the two Texas cases cited *supra*, the court held that *after* the survey the applicant *has a vested right* in the lands which could not be affected by the repeal of the statute. The expressions used in the opinion should be read with reference to the point decided—that after the survey the applicant has a vested right as against the State, but not before that time.

In Jumbo Cattle Co. v. Bacon, 79 Texas, 12, the court said:

"The question then is as to the effect of the act of January 22, 1883, which repealed the acts under which appellees made application to purchase the lands. The application had been made and the land had been surveyed when the repealing act took effect. Had the appellees then acquired a vested right which the legislature could not take away? * * * The ruling in White v. Martin, 66 Texas, 340, is decisive of the question. * * * In the case cited it was held there was a vested right which was not destroyed by the repealing act."

The decision by this court in Campbell v. Wade, 132 U. S., 37, construing the act in question is to the same effect. In that case it is said:

"The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right *as against the State*. * * * Clearly there was no such right in advance of the survey."

These cases do not decide that the interest which Russ had in the lands in question before a survey was made was not the subject of a valid contract as between him and Telfener. We insist, on the contrary, that the Texas decisions hold that such an interest is a sufficient consideration for a contract and is assignable.

In Graham v. Henry, 17 Texas, 164, appellee sued to recover a tract of land. He alleged that there was issued to him, July

6, 1838, a conditional certificate for 1,280 acres of land, and that September 27, of same year one Thorn, through whom appellant claimed, fraudulently procured from him an assignment of said certificate; that afterwards he (appellee) proved out his unconditional certificate and caused it to be located, surveyed and patented on the land in controversy; that appellant got possession of the patent and forcibly took possession of the land. He prayed for cancellation of the conditional certificate, for delivery of the patent, and for possession of the land. The question was as to the validity of the assignment under section 29 of Act of December 14, 1837, of the Republic of Texas, which as far as applicable, reads:

"(29.) Be it further enacted, That * * * every person who has arrived in this Republic since the Declaration of Independence, and previous to the first of October, 1837, who is a free white person and the head of a family, and who actually resides within the government with his family, shall be entitled to a conditional grant of twelve hundred and eighty acres of land, by paying the fees of office and surveying. The conditions of said grant shall be that both grantee and his or her family shall remain and reside within this Republic, and do and perform all the duties required of other like citizens, for the term of three years; after which time, he or she shall receive an unconditional deed for said land; and in no case whatever, shall a grant of that description be made unless it be satisfactorily proven that all the conditions and provisions of the law have been complied with."

The court said:

"Neither that act, nor any other in force at the time, contained any prohibition or restriction upon the power of the grantee to sell and dispose of his interest so soon as it was acquired. * * * * In general, whatever is susceptible of exclusive, individual appropriation, may be the subject of bargain and sale; so that property, considered as an exclusive right to things, implies not only a right to use, but a right to dispose of them. Whatever exclusive right a man has in any thing, he has a right to dispose of absolutely, as he pleases, pro-

vided he makes no disposition of it prohibited by law. It matters not what advances he has made towards acquiring the ultimate dominion, or absolute and complete proprietorship, the moment he has acquired an exclusive interest, though it be but a contingent and executory interest, he may dispose of it at pleassure, subject only to the condition that it is not forbidden by law. Hence, any incipient title, or contingent interest, which is susceptible of being ripened into a title to lands may be assigned; and such has been the usage in this and other countries. It has never been supposed necessary to consummate the title, before the right could be assigned. The conditional certificate vested in the grantee an interest or right which was capable of being perfected into a title. It was a contingent interest, it is true, subject to the condition that he and his family should remain and reside within the republic, and perform all the duties required of other citizens for the term of three years; after which he should receive 'an unconditional deed' for the land. (Ib.) But though a contingent, still it was an exclusive interest, or a right which was assignable in equity, and the transfer might be enforced, if made for a valuable consideration. Of course, the interest or right of the assignee would ultimately depend upon the performance of the precedent conditions by the grantee. He would take, subject to that contingency. But there is nothing in the nature of the interest, which the conditional certificate confered, to prevent its assignability.

"But though not forbidden by any express law, it is said the assignment of these conditional certificates ought not to be upheld, because contrary to public policy. * * * The law does not undertake to interfere in the private contracts of men, unless they are such as affect injuriously the rights of others, or are inimical to the interest and well being of society. And when they are to be so deemed, it has generally been left to the Legislature to declare. The courts would hesitate to go in advance of legislation in declaring contracts void on the ground of public policy; and where the Legislature has not spoken, they would not interpose, unless upon a legal necessity, arising from precedent and authority."

In Merriweather v. Kennard, 41 Texas, 273, referring to the assignability of conditional certificates, it is said: "In Graham v.

Henry, 17 Texas, 164, this question was directly presented to the court, and Justice Wheeler in a very able opinion, concurred in by the entire court, says it is the material question. * * This decision has been uniformly acquiesced in since 1856, and we now feel no inclination to question the wisdom of same." That case is also cited as authority in Capp v. Terry, 75 Texas, 395.

Applying the doctrine announced in these authorities to the contract on hand, there can be no doubt of the assignability of Russ' application. Russ had assuredly made some advance toward acquiring the legal title to the land, he had gone far enough to effectually exclude Telfener and all others of the same class for a certain period of time, and to that extent his interest was valuable and hence property. Again his interest, however contingent it may have been, was by virtue of his exclusive position susceptible of being ripened into a title to the lands. It lay within his power to perform the other conditions prescribed in the act, and acquire a vested interest. Telfener, however, did not have this power and his only means of acquiring it till the three months expired was through Russ. This interest was a valuable right as between Russ and Telfener, whatever the relations were as between Russ and the State or Russ and would-be pre-emptors. We submit that Russ had an interest in the lands in question, superior to that of the owner of a conditional certificate in his 1,280 acres. Clearly such owner had no vested right to land as against the State. For until he performed all the conditions precedent to acquiring title, requiring three years time, there was no acceptance of the State's offer, and hence no binding contract as decided in White v. Martin, 66 Texas, 340; Jumbo Cattle Co. v. Bacon, 79 Texas, 5. This is decided in Campbell v. Wade, 132 U. S., 34, where the court holds the right of a pre-emptor to be the same as the right of an applicant, before survey, under the act of July 14, 1879. The court said:

"But it has always been held that occupation and improvement of the tracts desired, with a view to pre-emption, though

vided he makes no disposition of it prohibited by law. It matters not what advances he has made towards acquiring the ultimate dominion, or absolute and complete proprietorship, the moment he has acquired an exclusive interest, though it be but a contingent and executory interest, he may dispose of it at pleassure, subject only to the condition that it is not forbidden by law. Hence, any incipient title, or contingent interest, which is susceptible of being ripened into a title to lands may be assigned; and such has been the usage in this and other countries. It has never been supposed necessary to consummate the title, before the right could be assigned. The conditional certificate vested in the grantee an interest or right which was capable of being perfected into a title. It was a contingent interest, it is true, subject to the condition that he and his family should remain and reside within the republic, and perform all the duties required of other citizens for the term of three years; after which he should receive 'an unconditional deed' for the land. (Ib.) But though a contingent, still it was an exclusive interest, or a right which was assignable in equity, and the transfer might be enforced, if made for a valuable consideration. Of course, the interest or right of the assignee would ultimately depend upon the performance of the precedent conditions by the grantee. He would take, subject to that contingency. But there is nothing in the nature of the interest, which the conditional certificate confered, to prevent its assignability.

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"But it has always been held that occupation and improvement of the tracts desired, with a view to pre-emption, though

absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties."

To this extent the interest of Russ and the owner of a conditional certificate was equally uncertain and contingent. The applicant for such certificate had to pay "the fees of office and of surveying" before being entitled to it. Under section 4 of the act of July 14, 1879, the surveyors were entitled to receive from applicants "all legal surveyors' fees for work done by them," and hence *before* any survey was made the applicant either paid or became legally liable to pay "the fees of office and of surveying." Russ had in fact contracted with the county surveyor of El Paso county for the surveys before the contract was made to sell his interest to Telfener. The conditional certificate entitled the holder, however, to no specific 1280 acres of land, while the applicant ,under act of July 14, 1879, had a contingent interest in the body of land designated in his application by metes and bounds. The certificate owner's "incipient title" to 1280 acres was at least dependent upon there being unappropriated public lands subject to location. In this material respect Russ' interest, when he contracted with Telfener, had in it a greater capability of being perfected into a title than did the owner of the certificate in Graham v. Henry, and under the authority of that case Russ' right, title and interest was a legitimate subject of contract and assignment.

There is another line of Texas decisions on the assignability of land certificates, that we think applicable in principle to the question at hand:

Johnson v. Newman, 43 Texas, 628.

Neal v. Bartleson, 65 Texas, 482.

Robertson v. Du Bose, 76 Texas, 78.

We submit. moreover, that our position is maintainable upon the well recognized doctrine that things not *in esse*, but having a mere potential existence, are the legitimate subjects of contract. Graham v. Henry, referred to above, announced the Texas rule on this point. Briggs v. United States, 143 U. S., 353, 354, decides that the sale, by the owner of the land, of a cotton crop not yet planted is valid, and that the title to the subject matter of the contract not in existence vests potentially from the time of the bargain, and actually as soon as the subject matter arises. To the same effect is Butt v. Ellett, 19 Wall., 544.

The validity of the contract in hand must be determined by the situation of the parties at the time it was entered into. If it be conceded for the moment that the subject matter never had an actual existence—that is, that no vested right to purchase was ever acquired—it is of no avail to plaintiff in error, because on the fifteenth day of November, 1882, he failed to pay the first installment of the purchase price, and thereby relieved Russ of further performance. If the sale was not completed and the right to purchase lost, it was because of Telfener's default November 15, 1882, which cannot be urged by him as a defense against losses of Russ sustained through his breach of contract. This court, in Anvil Mining Company v. Humble, 153 U. S., 551, 552, in laying down the rule which obtains when there is a breach of a contract, says:

"Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words he may abandon it and recover damages, the profits he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is really an acceptance of the situation which the wrong-doing of the other party has brought about."

Moreover the supplementary contract, "Exhibit N," wherein Russ undertook to have the lands surveyed, etc., and

thereby acquire a vested interest in them, is expressly conditioned upon Telfener's performance of his agreement. After referring to the contract in suit as having been entered into and the necessity to survey the lands the said "Exhibit N," provides: "Now therefore it is agreed by the said Russ that *if* the sale and transfer shall be made under said contract as aforesaid he will, at his own proper cost and expense, make all the surveys, etc.," said Telfener obligating himself to pay for said service at the rate of five cents per acre. The breach on Telfener's part November 15, 1882, precludes him from asserting that no valid surveys were made, nor the field notes returned in time to the Land Office, and therefore that his potential right never ripened into a vested right.

We submit in addition to these objections to such defense, that "Exhibit N" was an independent contract, the breach of which on Russ' part could not be pleaded by Telfener in a suit against him on the contract, "Exhibit M."

The question then is, did Russ have, November 1, 1882, a potential right to purchase said lands? If so it had an actual value, it was the subject of contract. The law term "potential existence" under the authorities, means anything that has in it the power or germ out of which the subject matter contemplated in the contract may be developed in favor of and for the benefit of the party claiming it. The owner of this inchoate subject matter must, in a general way possess the means by which it can be ripened into an actual existence. "A hope or expectation of means founded on a right in being may be the subject of a sale, because in such case there is a potential existence. But a mere possibility or contingency, not founded upon a right or coupled with an interest, cannot be." As already shown Russ had a present, contingent right of value that was susceptible, by performance on his part of certain conditions precedent, of being ripened into a legal title. There was a tangible, existing basis for the contract, something *in presenti*, of which the

thing *in futuro* was to be the product. The contract related to definitely described property which, if merely potentially existing, was sufficiently specific and certain for the minds of the parties to be in agreement as to what it was. If Russ did not own a vested right he had at the time of making the contract the agent of its production. He possessed more than a *mere* possibility or expectation of acquiring a title at some future day. A responsible party *intending* to make applipication, but who had not yet done so, occupied that position. Russ had gone a step beyond this. Why should Russ' interest be declared a mere nullity when the extremely contingent right under a conditional certificate or the precarious title to an unplanted crop are valid subjects of contract?

A very clear discussion of the subject of the sale of property, not yet in existence or not yet acquired, and a full citation of the authorities, will be found in 21 Am. & Eng. Encyc. of Law, 469–475.

If our view of the assignability of Russ' interest at the time of the making of the contract, November 1, 1882, is correct, then all of the assignments of error fall to the ground, because it would then be immaterial whether the ninety-eight sections of land were surveyed before that date, or the field notes, etc., were returned to the General Land Office within sixty days after the survey, or were ever returned, or the land was surveyed on the ground, or was surveyed at all.

IX.

First Proposition Under First Question.

The contract sued upon was from its execution a valid executory agreement to sell all the interest Russ then had or should acquire in the 98 unsurveyed sections, and since they were surveyed before November 15, 1882, the time set for making the sale and assignment, said sections were properly included in the verdict for damages.

The contract sued on was made November 1, 1882, but it was an executory agreement to convey, transfer and assign to Telfener all the "right, title and interest" Russ then had or might thereafter be entitled to, under his application and files upon payment of 90 per cent of the purchase money, which was to be done after an examination and inspection of said application in the surveyor's office and the maps in the Land Office, and after an approximation of the number of acres covered by said application; said acts to be done, however, and said payment made not later than November 15, 1882.

Between the first and fifteenth of November, 1882, the 98 sections were surveyed, and hence before the time to convey arrived Russ had, according to the decisions of White v. Martin, 66 Texas, 344, and Jumbo Cattle Co. v. Bacon, 79 Texas, 5, a vested right to complete the purchase and secure a patent to the entire 1813 sections.

It is too well settled to require argument that, under these circumstances, Telfener became liable on fifteenth day of November, 1882, as well upon the 98 as upon the other sections.

1 Am. & Eng. Encyc. Law, 827, 830.
21 Id., 471–475.
Blackmore v. Shelby, 8 Hump., 439.
Hotchkiss v. Olliver, 5 Denio, 314.
Conderman v. Smith, 41 Barb., 404.
Morrill v. Noyes, 3 Am. L. Reg., N. S., 18.
McCarty v. Blevins, 5 Yerg., 195.
Van Hoozer v. Cory, 34 Barb., 9.
Andrew v. Newcomb, 32 N. Y., 417.

We do not think the plaintiff in error can seriously mean to contend, as he apparently does on page 8 of his brief, that the right to complete the purchase and secure a patent was not vested until after the map and field notes were filed in the Land Office. The Texas cases, quoted at length by him, turn on the

very point that the right to complete the purchase vests immediately upon the completion of the survey.

X.

Second Proposition Under First Question.

Should the court hold that no recovery can be had as to the 98 sections surveyed after the making of the contract, then the judgment should be reversed and here rendered for the proper amount of damages, since the damages awarded in the verdict on account of said 98 sections can be exactly ascertained from the record.

The court instructed the jury, among other things, as follows: "On this point the evidence from the Land Office clearly shows that 1813 surveys of 640 acres each were made under plaintiff's two applications and you are so instructed. Of the 1813 surveys plaintiff claims nothing as to 25 thereof, which must be deducted, leaving involved in the controversy 1788 surveys of 640 acres each or 1,144,320 acres. (Tr., 22.) * * * The plaintiff claims that he is entitled to damages at the rate of 25 cents per acre on said 1,144,320 acres, as he contends that defendant agreed to pay him 25 cents per acre for the right, title and interest to the lands embraced within his applications. * * * You will therefore look to all the evidence in the case to determine the salable value of plaintiff's right on the 15th of November, 1882. If you conclude, from the consideration of all the facts and circumstances in evidence, that at said date said right had no salable value—in other words, that it was completely and absolutely worthless—the measure of damages would be 25 cents per acre on the 1,144,320 acres." (Tr., 24.) The verdict was as to principal amount $286,080, or at the rate of 25 cents per acre. (Tr., 29.) Under the charge of the court the jury awarded interest on said amount at 8 per cent per annum from November 15, 1882, to July 11, 1893, but the defendant in error entered a remittitur of part of the interest so as to make the rate

only 6 per cent per annum. (Tr., 29.) The amount of the verdict rendered as to the 98 sections of 640 acres each is, therefore, a matter of mere arithmetical calculation.

Decatur Bank v. St. Louis Bank, 21 Wal., 294.
Walbrun v. Babbitt, 16 Wal., 577.

XI.

THIRD PROPOSITION UNDER FIRST QUESTION.

The question now raised by plaintiff in error as to the 98 sections was not properly raised in the trial court, and hence should not be considered in this court.

The third bill of exceptions, upon which the assignment of error as to the 98 sections is based, after showing among other things the dates of the survey of said sections, concludes as follows:

"And be it further remembered, that after the above mentioned evidence had gone to the jury and the law of the case had been argued to the court and the facts to the jury, the court, of its own motion, among other things, charged the jury as follows: 'You are further instructed, that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications as set forth in the contract and shown by the evidence, was a valuable right and one which could lawfully be assigned.'

"And be it further remembered that, before the jury had retired to consider of their verdict, the defendant, for the purpose of correcting the error in the charge of the court above complained of, as well as the omission in the charge, and for the further purpose of having the law of the case given the jury as applied to the facts appearing in this bill of exception, presented in writing to the court, and before the jury had left the bar, the following special instructions:

* * * * * * * * *

"Defendant asks the court to charge the jury as follows:

"The court instructs the jury that the 'right, title and interest' of plaintiff, in his application and files on land, and which

he contracted to sell, was not a vested right on the first day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after November 1, 1882, you will not consider or include in the measure of damages." (Tr., 34, 35.)

It does not appear from the bill that an exception was taken to the above quoted paragraph of the court's charge objected to at the trial.

In Tucker v. United States, 151 U. S., 170, the court said: "The other instructions to which defendant objected are not subject to review, because the bill of exceptions does not show that he excepted to them," citing 20 How., 252.

On the other hand, the above quoted requested charge, in which the alleged error was sought to be corrected, even if correct as a general proposition, was inapplicable to the facts, and hence calculated to mislead. It leaves out of consideration the material fact that the contract sued upon was a mere executory agreement, and that the liability of Telfener was to be tested by the conditions of Russ' right, title and interest on fifteenth day of November, 1882.

The trial court was not bound to modify the requested charge so as to make it applicable. If a requested instruction is not strictly correct, the court's refusal to give it cannot be assigned as error. (2 Howard, 376.)

Our next proposition applies equally to the second and third questions discussed in the brief of plaintiff in error. It is:

XII.

PROPOSITION UNDER SECOND AND THIRD QUESTIONS.

After Telfener's default under the contract, it became wholly immaterial whether the field notes of the lands were ever returned to the General Land Office, and also whether the surveys were actually made on the ground or were merely office work.

This proposition is so clearly established by the Circuit Court of Appeals, in its opinion in this case that we are willing to submit it upon what it there said:

"The contract sued on is an agreement to transfer from Russ to Telfener all and singular the rights, title and interest that the said Russ now has or may be entitled to in and to said lands, by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that if such actual surveys had been made, he (Russ) would cause them to be returned and filed in the General Land Office at any time or in any manner whatever. The contract made the same day between the same parties, provided that Russ, at his own proper cost and expense, should make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and in the General Land Office of the city of Austin, Texas, in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made under the contract first mentioned, at the time agreed on, to-wit: November 15, 1882.

"As it is conceded that Telfener made default under the first mentioned contract on the 15th of November, 1882, and that the sale and transfer under said contract was never carried out, the second mentioned contract became wholly inoperative and irrelevant; and the rights of the plaintiff became fixed, definite, and certain on the 15th of November, 1882, at the time defendant Telfener made default. Under these circumstances, we fail to perceive any obligation resting upon Russ to either complete the surveys or file the same in the General Land Office. Whatever was done by Russ after the 15th of November, to perfect the surveys and file the same, was done at his own cost and at his own risk, and could in nowise affect the plaintiff in error Telfener, because the rule for damages in the case was, as declared by the Supreme Court in Telfener v. Russ, *supra*, as follows:

" 'On the 15th day of November, he (Russ) possessed all the right to the land which he ever possessed; and assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the

difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale.' "

XIII.

First Proposition Under Second Question.

When Telfener defaulted under the contract the right, title and interest of Russ under his application had become totally unsalable at any price, hence Russ was not required to incur the expense of returning the field notes and filing them in the Land Office.

From the charge of the court on the measure of damages and the verdict, it appears that the jury allowed as damages the full contract price of twenty-five cents per acre for the land in controversy. The jury then necessarily concluded that the right of Russ under his application had no salable value on the fifteenth of November, 1882. The policy of the law is to reduce damage to a minimum. Had Russ been able by perfecting his title, to have reduced the damages for which Telfener, by his default, became liable, it would have been his duty to do so. The authorities cited by plaintiff in error go to this extent. But inasmuch as by doing so Russ could not have saved anything to defendant, but would have imposed upon himself great additional loss, it follows from the very rule invoked, that it was Russ' duty to Telfener to do nothing further under the contract. The case of Anvil Mining Co. v. Humble, 153 U. S., 551, 552, quoted on page 19 of this brief, is decisive of this point in favor of defendant in error.

XIV.

Second Proposition Under Second Question.

The field notes of the entire 1813 sections of land were returned to and filed in the General Land Office within the time prescribed by law.

The survey of the 1813 sections was not completed until the last section had been surveyed. This was November 9, 1882, and field notes were filed in the Land Office, January 8, 1883, within the prescribed 60 days.

The law of 1879, section 3, says: "It shall be the duty of the surveyor * * * to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record and map the field notes of said survey. * * * ."

The expression "within sixty days after *said* survey" has reference to the first part of said section, which makes it incumbent upon the surveyor to survey the lands designated in said application. Substituting, then, these words for the words of "said survey," the section reads in the second part, * * * "and within sixty days after the survey of the lands designated in said application to certify to, record, map, etc. * * * ."

The lands designated in said application are the whole body of the land therein designated. Consequently the statute in the section quoted expressly provides that the field notes shall be recorded, mapped, etc., and same returned to and filed in the General Land Office within 60 days after the whole body of land designated in the application has been surveyed. The field notes and map of the land in controversy were filed in the General Land Office January 8, 1883, within 60 days after November 9, 1893, when the survey was completed.

Moreover, the officials of the General Land Office were the parties who were called upon, under the law, to determine whether or not the field notes were filed in time, and they having accepted and filed same, with knowledge of the date of the survey of each section, concludes the matter. They not only received and filed the field notes, but treated them as entitling Russ to a patent upon payment of the 50 cents per acre. This appears in the third bill of exception. "Receipts of the State Treasurer on file in this office (General Land Office) show that

the purchase money—50 cents per acre—was paid on 25 of the aforementioned surveys. * * * There is no evidence that the purchase money was paid on the others."

Section 5 of the act of July 14, 1879, provides that "upon presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall give to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for." Russ was therefore entitled to a patent on said 25 sections.

The conclusiveness of the determination by such officers of the facts upon which they might act in issuing a patent for land is maintained in Barden v. R. R. Co., 154 U. S., 327, et seq. The determination by the Land Commissioner and Treasurer that the field notes to the 25 sections surveyed November 3, 1882, and returned January 8, 1883 (Tr., 33, 34), were filed within sixty days after the survey necessarily leads to the conclusion that the survey of the entire 1813 sections were considered as one survey, and that the field notes to same were filed in time.

Again the law imposes the duty of making such return, not upon the applicant, but upon the surveyor, and the failure to make such return within the time, by the surveyor, is not a reason for forfeiture under the terms of the act.

The ninth section of the act contains the only provision for a forfeiture of the right secured by a survey, and that provision is, that should any applicant for the purchase of public land, fail, refuse or neglect to pay for same at the rate of fifty cents per acre, within the time prescribed in section 5 of this act, he shall forfeit all right thereto, and he shall not be allowed thereafter to purchase the same.

No forfeiture for any other reason is stipulated for in said law, and it would follow as a legislative intent and the fair import of the law, that the failure to pay at the rate prescribed per acre, within the time stipulated for by the law, is the only cause for forfeiture; that, unless other conflicting rights have accrued in

the meantime, failure to comply with the steps prior to the payment within the limits put upon them by law, would not work a forfeiture of such rights. Intervening rights have, however, not been shown to exist in this case. This construction of the law is maintained in analogous cases that came before this court.

Craig v. Bradford, 3 Wheat, 593.
Taylor v. Brown, 5 Cranch., 234.
Stringer v. Lessees, 3 Peters, 320.

If the contention that the application of October 5th was not part and parcel of the application of October 4th be granted it could not materially change the judgment, because the evidence shows that the application of October 5th covered sections 1 to 48 inclusive in block I (Tr., 34); and further, that surveys 35 to 44 inclusive in block I had been paid for and did not enter into any calculation of the judgment. Thus the only surveys under said application of October 5th which were contemplated in the judgment were forty-eight less ten, viz., thirty-eight. Thirty-eight sections at 25 cents per acre would make an excess of the judgment of $6,080 with interest thereon. This would only require a modification of the judgment to that extent.

This leaves for discussion, in case what we have said has not already disposed of it, the question as to the validity of the survey.

XV.

First Proposition Under Third Question.

Although the burden of proof was upon defendant, he did not offer such evidence as required a charge concerning the validity of the surveys.

The testimony bearing upon this point is contained in the third and fourth bills of exceptions. (Tr., 32–37.) It has been fully summarised on page 7, *supra*, of this brief. The whole

testimony of plaintiff in error relied on as requiring his requested charge on this issue, consists of the expert testimony of his witness Maddox. After testifying that it was four miles around each section of 640 acres, that one surveyor could not have surveyed in one day the number of sections of the land shown by the testimony to have been surveyed, and that the average number of miles that a surveyor could survey in a day is from ten to fifteen miles, he, on cross examination, testified "that by putting only two corners to each survey, you could, as an illustration, survey block 'J,' containing twenty-four sections, by running only fourteen miles; that the distance around one section was four miles, which makes a total distance of ninety-six miles around twenty-four sections of land; that the more surveyors you have the more work you can do; that one surveyor could sorter supervise the other surveyors, but that he could not be with each surveying party, but could direct their general movements; that the amount of work that could be done would increase according to the number of surveyors employed at a specified time, and the number of sections one surveyor could survey depends upon the number of men he had with him; and that the additional number of men would facilitate the surveyors in crossing streams, making set offs, etc;" that making only two corners to each section "would be actual surveying on the ground—that is, what is termed actual surveying on the ground is work done on the ground by which you could identify a survey. This work would be that kind." (Tr., 36, 37.)

It should be observed that Maddox does not say what kind of a survey would be necessary to identify a section on the ground. He says that the fixing of two corners would do so, but not that the fixing of one corner would not equally do so. As against this indefinite expert evidence was the direct testimony of Duncan: "I do know that the survey was made and the field notes returned to the General Land Office, because I superintended the survey and helped to take the field notes to the office and saw

plaintiff pay the filing fee of $1 per section." Maddox's statement, as appears from reading his testimony *in extenso*, was that the surveys could not have been made on the ground in the time stated by fixing four corners and running four miles for each section surveyed. According to his own admission, however, on cross-examination, that was not necessary to constitute a survey on the ground. Without having before us a map of the different blocks surveyed, showing the relative situation of each section to the other, we are left to a conjectural though interesting mathematical problem of permutations and combinations in order to ascertain the least distance that one surveyor would have to travel to survey 207 sections—the highest number shown to have been surveyed in one day—and make only two corners to each section. If locating on the ground one corner was sufficient, and it was according to Maddox's definition of an actual survey the problem was one that no court would have been warranted in submitting to a jury—especially not at the request of a party who could have simplified the matter by a further examination of his witness as to what was an actual survey, and by a production of copies of the maps of the surveys on file in the land office, showing the relative locations of each section. If the court has any desire to go into this calculation, it will find that, in order to locate even each corner of each section on the ground, it was not necessary, as seems to have been assumed by Maddox in stating that the surveys could not have been made, that four times as many miles should be run as sections surveyed. This could be done for example in a square containing four sections by running four miles on the first section, three miles on the second, three miles on the third and two miles on the fourth, or a total of twelve miles instead of sixteen. So a block of 207 sections, whatever its shape, could be run and four corners made to each section by running much less than four times the number of sections surveyed. The distance run, however, in surveying a block of 207 sections would be immensely less if only two corners were located on the

the ground, which Maddox says was sufficient. He illustrates it by testifying that block J of twenty-four sections could be so surveyed by running only fourteen miles.

We submit further that, as far as the testimony shows, a survey on the ground, according to the statute, could be still further simplified.

If there is a block containing 100 or 200 sections, would it be sufficient to run the outside lines of said block and establish its four corners and then draw parallel lines, thereby establishing the number of sections surveyed in the said block? Would not, in this instance, each one of the sections be definitely established, and could its location not be absolutely ascertained from any one, or two, or three or all four of the corners actually established on the ground? Could there be an uncertainty as to the actual location of any one of said sections on the ground? We think not.

We may go further, and say that if two corners of a square block are established, then by means of these two points, the exact location of the whole block can be readily established and, from these two points or from either of them, each survey could be actually identified by course and distance and upon the ground.

Lastly, if one corner of a square block is established, does not that one corner furnish sufficient aid by means of which to determine the location, on the ground, of the whole block, as well as its subdivisions, the sections thereof?

The case of Bacon et al. v. The State, 2 Texas Civ. App. Rep., 692, quoted at length by plaintiff in error, decides that in surveying large blocks of land under the act of July 14, 1879, it was only necessary to run the outside boundary lines of the block and establish its corners, leaving the interior lines between the sections without running. The fifteenth finding of fact by the court in that case (page 695) was, as far as material, as follows: "Blocks 97 and 27 were actually surveyed on the ground by Elgin

in the manner in which it has been customary by surveyors in Texas to survey large bodies of land; that is by running the outside boundary lines the blocks, or a part of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up field notes, were divided into 640-acre surveys, and the interior surveys were made without actually running the lines; and Elgin did not run all the lines of any section in blocks 27 and 97 unless, as he says, it was done by accident."

The court held that this was a legal survey under the act of 1879 and its amendments, saying:

"This surveying was done by dividing large blocks of land into sections containing 640 acres each, as will be seen by reference to our conclusions of fact, and was done upon the ground in such way as might be regarded as work in the field." The part of the opinion quoted by plaintiff in error holds that a surveyor cannot under the law, merely adopt previous surveys, by copying the field notes thereof on file in his office. The survey for Bacon was simply a copy of the field notes of said Elgin survey on file in the surveyor's office. This part of the ruling is inapplicable to the case at bar. If it was only necessary to run the outside boundaries of the blocks, the force of the argument of plaintiff in error entirely fails.

In addition to the direct testimony of Duncan that the surveys were made on the ground there was the certified field notes of the surveyor showing the dates of the surveys.

Article 3908, Revised Statutes of Texas, in force at the time when the land in controversy was surveyed and the field notes returned to the general land office, reads as follows:

"The field notes of every survey shall state—

"1. The county or land district in which the land is situated.

"2. The certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers,

date, when and where issued, name of original grantee and quantity.

"3. The land by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement by varas).

"4. A diagram of the survey; and

"5. The variation at which the running was made.

"6. It shall show the names of the chain carriers.

"7. It shall be dated and signed by the surveyor.

"8. The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same, and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page.

"9. When the survey has been made by a deputy, the county or district surveyor shall certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record."

Upon the principle *omnia rite esse acta presumitur*, when said field notes were certified to in the surveyor's office in El Paso county, it is presumed that they then had been made in accordance with law and that they showed, by the necessary endorsements on the part of the county surveyor, that the above requirements of the law had been complied with; and again, when they were offered for filing and accepted and filed in the General Land Office, the presumption attached that they were made in strict conformity with the law. The presumption is even stronger from the fact, that patents actually did issue for twenty-five of the sections of the said 1813 surveys, and before they issued, that office certainly scrutinized the field notes for the purpose of ascertaining that the patents issued properly.

The certificate of the General Land Office, in evidence, carried with it then the presumption that the field notes had been properly prepared and filed, and so far as the issue involved in this question are concerned, they are presumed to have stated that

the surveys of each and all of the sections were actually made in the field.

In Pollard v. Dwight, 4 Cranch., 421, where almost the identical argument was used against the validity of a survey as is used in this case, the court held, that the official certificate of a survey returned by a legal sworn surveyor, could not be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of entry and the date of the certificate of survey. That case is an authority directly in point.

In Lessee v. Bradshaw, 4 Wash. C. C., 171, it is held that when a survey has been returned and accepted, it is *prima facie* presumed to have been legally made, and it is for him who says it was not to prove the fact.

In Cofield v. McClelland, 16 Wall., 335, the court says: "The case comes within the rule, so well settled in this court, 'that the legal presumption is that the surveyors * * * have done their duty in regard to the several acts to be done by them in granting lands, and therefore surveys and patents are always received as *prima facie* evidence of correctness.'" See to same effect Knox County v. Bank, 147 U. S., 97.

It is insisted, however, that this presumption has been overcome—that there was at least sufficient evidence that the surveys were mere office work, to require that issue to be submitted to the jury.

The rule on this point is laid down in Pleasants v. Fant, 22 Wall., 116, where it is held that "before the evidence is left to the jury there is a preliminary question for the judge—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." See also Anderson County v. Beal, 113 U. S., 241, and Randall v. R. R. Co., 109 U. S., 483.

The testimony relied on by plaintiff in error, if admissible on this issue, is too indefinite to overcome the positive testimony of Duncan and the presumption attaching to the surveyor's certificate and to the acceptance of his work by the Land Office and Treasurer's department. No inference of fact can be reliably drawn from premises which are so uncertain. Besides, it is not the best evidence that the case admits of, and hence, if competent at all, is at least open to suspicion. It appears from subdivision 6 of article 3908 of the Revised Statutes of Texas, that the field notes of every survey shall show the names of the chain carriers. An inspection of these field notes on file in the General Land Office would show who the chain carriers in this survey were, and their depositions might have been taken. Although it was shown that the county surveyor was dead, it does not appear that the testimony of these chain carriers could not have been obtained. That would have been direct and unanswerable evidence. Why was it not used?

There is another reason why Maddox's testimony was worthless.

He testified that said survey could not have been made in one day *by one surveyor*. Duncan testified that he employed the county surveyor and all his assistants to make the surveys and that between twenty and thirty people altogether were occupied in the work. Maddox testified that the amount of surveying that could be done would increase in proportion to the number of surveyors employed. It is thus evident there were a number of different surveying parties all co-operating in pushing the work to a speedy termination. As three persons can make a survey there may have been between seven and ten surveying parties at work at the same time. If we consider that the body of land designated in the application was already described by metes and bounds, courses and distances, the surveyors were in a position to make quick work of the matter without disregarding

the law. As under Maddox's statement twenty-four sections only required the surveying of fourteen miles and one man could survey from ten to fifteen miles a day, it follows that ten surveying parties could have surveyed 240 sections in one day, either isolated or adjoining blocks of twenty-four sections each.

It appears from the record, however, that the 207 sections—the greatest number surveyed in a day—were in two blocks of 73 and 135 sections respectively. If the block of seventy-two sections was six sections wide and twelve long, it could have been surveyed—fixing two corners to each section—by running forty-five miles. So a block thirteen sections long and ten wide could have been surveyed by running eighty-one miles. It is then evident that the number of parties surveying could easily have surveyed 207 sections and established two corners to each.

But it was admitted on the trial that Randolph, the county surveyor's name, was signed to all the field notes of the 1813 sections. From this, it is argued, that no person but Randolph could make the surveys; that he was the only surveyor and he could not alone have surveyed the 1813 sections within the time they appeared to have been made. There would be force in this position if it had been stated that Randolph's name was the name appearing on each set of the field notes as the surveyor who made the survey, but nothing is said as to the *character* in which the signature of Randolph appeared to each set. By virtue of Article 3908, Revised Statutes of Texas, above quoted, and which provided that when the survey has been made by a deputy, the county surveyor shall certify officially that he has examined the field notes, has found them correct and that they are duly recorded, we conclude that as he could not have *made* the 1813 surveys, he simply signed the proper certificate. It is a significant fact that there is no evidence that the names of the same chain-carriers were signed to each of the 1813 sets of field notes. But it is insisted that nobody but Randolph, the county sur-

veyor, could, under the law, have made these surveys. If this is a serious contention, we reply that Article 3908, in paragraph 9, clearly contemplates that the act of the surveyor may be done by his deputies; and the law of 1879 did not, either directly or by any implication, repeal article 3853 of Revised Statutes of Texas, which invests the deputy with the powers of the surveyor and which reads as follows:

"Art. 3853. The district or county surveyor of any county shall have the power to appoint a special deputy, who shall be empowered to perform all official acts which said district or county surveyor may legally perform."

In Bates v. Thompson, 61 Texas, 335, the Texas Supreme Court says that it seems to be the duty of the deputy surveyors to do the field work, as there is no law which makes it the duty of the principal surveyor to do such work.

But passing from a discussion of the import of the evidence on the question of surveys in the field, if it be granted, for argument sake, that there was enough evidence to arouse a suspicion as to the validity of the survey, we still insist that the charge offered could not have been given because:

XVI.

Second Proposition Under Third Question.

There was no evidence whatever which indicated what surveys had been and what had not been made on the ground, and the charge did not define, an "office survey" or "a survey in the field."

The requested charge reads as follows:

"If the jury find from the evidence that any of the sections of land described in plaintiff's petition were not actually surveyed on the gound, then and in such case they are instructed that such surveys are void, and for such sections plaintiff cannot recover;